

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1332

To be argued by
EDWARD R. KORMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1332

UNITED STATES OF AMERICA,

Appellee,

—against—

ZVONKO BUSIC, JULIENNE BUSIC, PETAR
MATANIC and FRANE PESUT,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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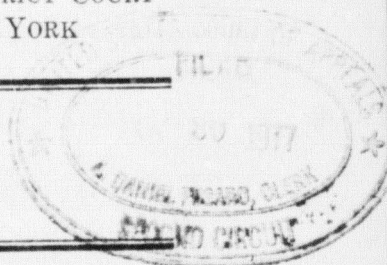


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and FRANE PESUT,

Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

The defendants Zvonko Busic, Julianne Busic, Frane Pesut and Petar Matanic each appeal from judgments, entered in the District Court for the Eastern District of New York (Bartels, J.), convicting them of the offenses of air piracy and of conspiracy to commit the offense of air piracy. The defendants, Zvonko Busic and Julianne Busic, were sentenced to life imprisonment, the mandatory minimum sentence for the offense of air piracy where a death results from the commission of the of-

¹ The district court judge, however, designated that the defendant Julianne Busic be eligible for parole after serving eight years, instead of the minimum of ten years, which she would normally be required to serve before becoming eligible for parole. The United States has taken a cross-appeal from that part of the judgment of conviction. Our brief was filed on October 3, 1977.

fense (49 U.S.C. 1472(i)). The defendants, Frane Pesut and Petar Matanic, who were acquitted of Count One of the indictment which charged them with the commission of the offense of air piracy resulting in death, were each sentenced to imprisonment for a period of thirty years for the commission of the less aggravated offense of simple air piracy. Moreover, each of the four defendants received concurrent sentences of five years imprisonment on their conviction of conspiracy to commit air piracy.²

Statement of the Facts

A. The Seizure of T.W.A. Flight 355

On Friday, September 10, 1976, at approximately 6:45 P.M., T.W.A. Flight 355, which was scheduled to fly from New York to Chicago, and then on to other points west, began taxiing toward the runway from which it would take off at LaGuardia Airport. The Boeing 727, which usually seats 120, carried 85 passengers, and crew of seven (Tr. 1502-1509). The eighty-five passengers included four men and one woman who were travelling together with one-way tickets issued in names other than their own, and who were seated in various parts of the aircraft. Seated by himself in the first-class section was an unemployed carpenter (Tr. 3284), Petar Matanic, whose ticket was issued in the name of S. Radic (Tr. 2543). And scattered throughout the coach class section were Zvonko and Julienne Busic, travelling under the name of Mr. and Mrs. T. Lubin (Tr. 2544), Frane Pesut, travelling under the name of T. Hoss, and Marc Vlastic, travelling under the name of J. Marek (Tr. 2544).

² A fifth defendant, Marc Vlastic, plead guilty, prior to trial, to the offense of air piracy. He was sentenced to thirty years imprisonment with a provision that he be eligible for parole at the discretion of the Board of Parole.

After a delay of approximately 55 minutes, Flight 355 took off at about 7:40 P.M. Shortly thereafter, Thomas Van Dorn, a flight attendant, entered the cockpit and handed the Captain, Richard Carey, an envelope which had been handed to him by a passenger on the plane (Tr. 1511). Captain Carey, after some trepidation, opened the envelope and read the note, which told him that (Tr. 1513):

"One, this airplane is hijacked.

Two, we are in possession of five gelignite bombs, four of which are set up in cast iron pans giving them the same kind of force as a giant grenade.

Three, in addition, we have left the same type of bomb in a locker across from the Commodore Hotel on 42nd Street. To find the locker take the subway entrance by the Bowery Savings Bank. After passing through the token booth there are three windows belonging to the bank. To the left of these windows are the lockers. The number of the locker is 5713.

Four, further instructions are contained in a letter inside this locker. The bomb can only be activated by pressing the switch to which it is attached but caution is suggested.

Five, the appropriate authorities should be notified from the plane immediately.

Six, the plane will ultimately be heading in the direction of London, England."

The delivery of the note was shortly followed by a knock on the cockpit door. The door was opened and the defendant Zvonko Busic entered the cockpit "wearing bomb apparatus about his person" (Tr. 1523), and proclaiming himself to be a member of the Croatian Libera-

tion Front (Tr. 1537). The apparatus was composed of "three dynamite sticks" which "were taped together with electrical tape." Moreover, "[p]rotruding from the dynamite sticks were wires which circled his neck." Captain Carey also observed an electric switch which was enclosed in Mr. Basic's hand with "his fingers on the switch" (Tr. 1524).

Mr. Basic told Captain Carey that there were six hijackers aboard the plane, "five of them at this time were known" to the crew of the plane, and one would remain unknown (Tr. 1531). He then directed Captain Carey to "take the airplane toward Europe" (Tr. 1526). Captain Carey told Mr. Basic that the plane did not have sufficient fuel for such a trip, and he managed to persuade Mr. Basic that refueling was essential (Tr. 1528-1530).³ Although Mr. Basic refused to permit the plane to land in the United States for refueling he agreed to a stop in Montreal, Canada (Tr. 1530).

While heading toward Montreal, Mr. Basic explained to Captain Carey that the gelignite bombs in cast iron pans, to which the note referred, were not assembled until after the hijackers boarded the aircraft (Tr. 1533). They were put together from cast iron kettles which were gift wrapped, and empty, when the hijackers went through security. "[O]ther members of [Mr. Basic's] crew carried through electrical wires, switches [and] the components of these bombs" (Tr. 1534). Captain Carey was told that the purpose of the hijacking will become known when the authorities received the second note in a locker in Grand Central Station in which yet another bomb had been

³ Mr. Basic insisted that the plane was scheduled to fly on to Tucson, Arizona after its flight to Chicago, and he learned that the stopover in Chicago would simply be to take on and discharge passengers. Accordingly if there was sufficient fuel to fly to Tucson, the plane could fly to Europe (Tr. 1528).

planted (Tr. 1537-1538). This second note, Busic said, "would contain instructions to have the contents of certain propaganda leaflets", a copy of which he gave Captain Carey, published in five major American newspapers.

Mr. Busic explained that there were liaison people in the United States who would confirm the publication of the propaganda document and "contact American authorities and give them a code word * * * and that code word would be delivered to us aboard the aircraft through channels" (Tr. 1539). Captain Carey, "[s]atisfied that they did not intend to perpetrate any atrocities upon us as a group," agreed to fly the plane to Europe. "We would not try any funny stuff. We would cooperate one hundred per cent with him to get the airplane to Europe" (Tr. 1539). In return for this promise, Busic agreed that the hijackers would surrender in Europe after it had been determined that the demands were met (Tr. 1539).

During these negotiations, Mr. Busic told Captain Carey that "other members of his group had been acting in the cabin to inform our passengers exactly what their purposes were. They made themselves known as members of their hijacking group to the passengers, and were in the process of calming the passengers down, explaining that they intended not to do any harm to the passengers and giving them copies of this leaflet they had prepared * * *" (Tr. 1540).⁴ Moreover, Mr. Busic agreed to permit Captain Carey to make a public address announcement to all the passengers to further calm them down (Tr. 1540).

One of the principal participants in "calming the passengers down" was the "powerfully built" six foot three

⁴ The defendant Julianne Busic had taken the steward, Tom Van Dorn, back to the passenger section of the aircraft and pointed out to him the other participants in the hijacking (Tr. 3720).

inch, 225 pound,⁵ unemployed carpenter seated in the first class section, the defendant Petar Matanic. He was "first up" at the "very beginning" (Tr. 3714), walking back and forth with his hand in his pocket. One of the passengers, Noreen Collins, who made a contemporaneous written account of all of the events (Tr. 4774), vividly described the scene (Tr. 4769). She observed Petar Matanic and Julienne Busic near the front of the first class section "and then the Captain said that we had to remain in our seats and if we wanted to go to the bathroom, we had to raise our hand." Petar Matanic's job was "to stand up front, facing us, or come and get us if we needed to go to the bathroom and escort us." When he wasn't doing this he would walk back and forth in the aisle and "whenever he would—either stand up there or walk back and forth, he had his right hand in his pocket and it's—there was something protruding out of his pocket" (Tr. 4769-4770). What was apparently protruding was a tear gas gun which Zvonko Busic had given Matanic for "protection" (Tr. 3171-3172), and which the passengers believed was a gun (Tr. 4770). Moreover, not content with this display of force by Matanic, the defendant Zvonko Busic made another appearance in the passenger section, with his necklace of what appeared to be dynamite and its triggering mechanism plainly visible (Tr. 4771).

With the plane thus under the control of the hijackers, it landed in Montreal at about 9:15 P.M. Because they believed there were bombs on the plane, the authorities at Montreal refused to permit the plane to approach the boarding ramps where the fuel hydrants were located, and there was a lengthy delay while fueling trucks were

⁵ The description of Mr. Matanic's physical appearance is taken from his brief (p. 21, n. 24).

secured to drive out to where the plane had stopped (Tr. 1546). During this period, Basic put pressure on Captain Carey "to emphasize that he and his group had bombs, they were in a position holding hostages, and could blow us up at any time" (Tr. 1552).

After the refueling was finally accomplished, and the plane took off for Gander, Newfoundland, Zvonko Basic told Captain Carey that he wanted to circle Montreal and drop leaflets over the City of Montreal (Tr. 1548). Captain Carey, however, managed to persuade Basic that such action would be dangerous. "If we drop them out of the window, with our engines located on the tail as they are, it is a good possibility we can inject the leaflets into the engine" (Tr. 1548).

Having achieved this limited concession, Captain Carey tried to persuade Basic to release all the passengers when the plane landed for refueling again in Gander, Newfoundland (Tr. 1549). Basic refused, saying that "he had no responsibility to let any hostages go" (Tr. 1550). Captain Carey, however, told him that if they released some of the hostages, they could give them some of the leaflets which could not safely be released from the plane, and that they could then be dropped by other aircraft (Tr. 1550). Basic accepted this suggestion and agreed to release thirty of the passengers at Gander.

Captain Carey asked Basic to select the passengers to be released because he did not want "to go back and pick among the passengers" (Tr. 1550). Basic and his wife Julianne then went through the passenger section and determined who would go, and who would stay (Tr. 4776). Moreover, during the trip to Gander, a few of the passengers got a chance to talk to Julianne Basic, "and someone questioned the security procedures at T.W.A., at the Airport and how any bombs could get through." Mrs. Basic responded that "she didn't know about that but she herself had carried explosives through

security and nothing happened" (Tr. 4773). Mrs. Busic, as well as the defendant Petar Matanic (Tr. 3477, 3479), also passed out leaflets which purported to be a declaration of the Croatian National Liberation Forces and asked the passengers to read it (Tr. 4773). Mrs. Busic also offered to answer any questions the passengers might have (Tr. 4773-4774).

The plane landed in Gander at 12:45 A.M. on Saturday, September 11, 1976, some five hours after takeoff (Tr. 1553). The passengers who were selected to leave were told to stand in the aisle and they were given leaflets along with instructions to turn them over to the proper authorities. They were told by Mr. Busic that if they did not carry out his instructions, "it would be on their consciences if anything ever happened to us" (Tr. 4778). Moreover, in this exercise, as well as in others, "[a]ll the members of the group assisted one another in accomplishing whatever difficulties they had with the passengers or with [the crew]" (Tr. 1554). Ultimately the instructions of the hijackers were carried out and the leaflets were dropped over Chicago, Montreal and New York (Tr. 1559).

After these passengers were released, a Boeing 707 jet, which was owned by T.W.A., landed at Gander. The crew members aboard the Boeing 707 tried to persuade the hijackers to use that aircraft for the transatlantic flight, since it had the fuel reserves and navigational equipment which the Boeing 727, the hijacked aircraft, did not have (Tr. 1560). All of the hijackers were in the cockpit at that time listening to the conversation over the radio (Tr. 1559). Captain Carey also explained to Mr. Busic that he thought a transatlantic flight in the hijacked plane was risky, but that if Busic insisted, he told him it would be done (Tr. 1560).⁶ Busic decided to

⁶ The nature of the risks were thoroughly detailed by Captain Carey (Tr. 1561-1563).

take the risk (Tr. 1560), and the Boeing 727 left Gander at 4:00 A.M., some eight hours after it had taken off from LaGuardia (Tr. 1566). Its destination was now Iceland.

During a good part of the flight to Iceland, the defendant, Frane Pesut, remained in the seat behind Captain Carey holding one of the pot bombs in his lap (Tr. 1568). Moreover, some of the passengers who were curious about the planning of the hijacking struck up a conversation with the defendant Petar Matanic. During this, and other such conversations, Matanic told the passengers that the hijacking had taken place on a weekend because it would generate greater publicity (Tr. 3925-3926, 1816-1817),⁷ that the tickets had been purchased ten days earlier, that they *all* had one-way tickets to Chicago, and that "they had made five or six dry runs to see if they could get the explosives through security" (Tr. 4779). Matanic, however, refused to answer a passenger who asked whether he was involved in the dry runs (Tr. 4779). Moreover, Matanic conceded that he may have told one of the passengers that he was not doing it for himself, but for the others (Tr. 3925).

The plane landed in Keflevik, Iceland, about 7:00 A.M. on September 11, 1976, where it was refueled. Moreover, several suitcases containing leaflets were transferred to the Boeing 707 which had flown to Iceland along with the hijacked aircraft. The transfer was made so that leaflets could be dropped over London and Paris (Tr. 1573).⁸ The

⁷ At trial, in support of his claim that he had no prior advance notice about the hijacking, Matanic explained this conversation as follows (Tr. 3926):

"I discussed with [the passenger] about weekend *** but I was referring for weekend it would be better for them. I was referring to Zvonko and others because I was only one, I *assume* I didn't know nothing about it." [Emphasis supplied].

⁸ While in Iceland, the defendant, Petar Matanic, also left the aircraft, along with one of the stewards, Tom Van Dorn, and returned with some provisions and navigational charts (Tr. 1574).

hijacked 727 then took off for Europe at about 8:45 A.M. on September 11, 1976, now some twelve hours after the original takeoff from LaGuardia. The Boeing 707 accompanied it and dropped the propaganda leaflets, first over London (Tr. 1577), and then over Paris (Tr. 1579).

As the hijacked plane approached Paris, a French military aircraft flew alongside it and the pilot signaled to Captain Carey to follow him (Tr. 1580). At this point, the defendant Frane Pesut "came running through the aisle [of the passenger section] holding a bomb, yelling at us, pull down the shades, pull down the shades" (Tr. 4781-4782). This was the same Mr. Pesut who would later claim that he could not speak English, that he was coerced into participating, and that he was so afraid the bomb he was carrying was live "that [he] held the bomb so rigidly throughout the trip that he came back to the United States with a backache" (Br. for App. Pesut, p. 13, n.16).⁹

At last the hijacked aircraft made its final landing in Paris at approximately 1:00 P.M. (E.D.T.) on September 11, 1976. There then began a terrible twelve hour ordeal for both passengers and crew as they waited for the crucial code word—the code word that would tell the hijackers that their demands regarding the publication of their propaganda leaflets had been met. By this time some eighteen hours had elapsed since takeoff from LaGuardia. The air conditioning on the plane was not in operation. The lavatory facilities were overloaded, and there was a rank odor throughout the aircraft (Tr. 1558). And the hours continued to pass without the code word. During this period, the members of the hijacking team

⁹ This nonsensical story was also undermined by the testimony of his co-defendant, Petar Matanic, who testified that Pesut fell asleep with the bomb next to him (Tr. 3923-3924). Matanic then picked up the bomb and carried it through the passenger section of the aircraft (Tr. 3923, 3272).

shared positions in the cockpit (Tr. 1591), and they began insisting that the code had not been received because their demands had not been met and their propaganda had not been published in various newspapers (Tr. 1591-1592).

Captain Carey could take the ordeal no longer (Tr. 1592), and finally broke into tears. "I cried. I couldn't make my voice explain any longer that we are eighteen hours into a highjacking and we are as if we just arrived here and were not expected" (Tr. 1592-1593). Shortly thereafter, he sent for a Catholic Bishop, who he knew was on the plane, to help him get his bearings (Tr. 1595). Moreover, after spending a few minutes in the cockpit, the Bishop told the passengers that "we'd better ready ourselves to meet our Maker, that we were going to die and he would give final absolution to all who are Catholic" (Tr. 4783, 3464).

According to passenger Noreen Collins, "this was our first indication that we were going to die * * * people were crying and just sitting there dumbfounded * * *" (Tr. 4784). The tension subsided briefly when Julianne Busic came out, and told the passengers not to worry, "you'll be alright" (Tr. 4784). But sometime thereafter, about 6:00 P.M. (E.D.T.), "all of a sudden there was a lot of yelling" (Tr. 4784). The passengers were forced "to stand up tightly in a huddle, in a circle", around Marc Vlasic, the hijacker who plead guilty (Tr. 4784). Vlasic stood on top of one of the seats "so he was taller than everyone else and he held a bomb in his hand all the time and we had to stare at him and not turn around and talk at all" (Tr. 4784). The defendant Pesut was also in the huddle holding a bomb (Tr. 3485-3486). Zvonko Busic then came out and told the huddled passengers that the American Government wasn't doing anything for them. And then Busic said (Tr. 4785):

"I'm going to do something to make your Government shit in their pants. He said, I'm going to kill you."

After being subjected to this, one of the male passengers collapsed (Tr. 4785). The hijackers ultimately permitted him to be removed through the back door of the plane into an ambulance. This event was to precipitate another outpouring of threats against the passengers. It seems that Petar Matanic and one of the stewards left the plane with the sick passenger. When Matanic returned without the steward both Zvonko Busic and Marc Vlasic demanded that Matanic go back and get him. Matanic then left the plane. Vlasic then started to yell at the passengers that if Petar was not back in two minutes: "I'll kill you all. I'll blow you up. I'll kill you" (Tr. 4787). At last Petar returned (Tr. 4788).

By this time the patience of the French was also wearing out. They had shot the air out of the tires of the plane (Tr. 1610), and issued an ultimatum to the hijackers to surrender (Tr. 1607). Busic said they were ready to surrender "upon proof their demands had been met" (Tr. 1608). The demands had, of course, been met but there was no code word. And Busic continued to pressure Captain Carey to get the proof (Tr. 1611). By this point the hijackers were apparently panicky, and acting so erratically that, in a moment when they were all out of the cockpit, Captain Carey asked the authorities if they could get a behavior specialist (Tr. 1613). "This condition persisted for about a half hour, maybe 45 minutes, to where members of the hijacking team were in and out of the cockpit screaming and acting uncontrollably" (Tr. 1614).

Somehow, in this pandemonium, an agreement was reached. Mrs. Busic, along with the co-pilot were going to leave the plane, and she would "make some phone calls to individuals who the hijackers would trust would give them the straight scoop" as to whether the demands regarding the publication of their propaganda were met (Tr. 1616). This was about 9:00 P.M. (E.D.T.), about 25 hours after the takeoff from LaGuardia. When she left the

plane, Mrs. Busic left her handbag, which contained a diagram of a Boeing 727 (Tr. 3683), along with other information about the aircraft, that had been photocopied from pp. 274-275 of the 1973-1974 volume of *Jane's All the World's Aircraft* (Gov. Ex. 40, Tr. 2468).¹⁰

When they were waiting for Mrs. Busic to make her calls, Petar Matanic and Marc Vlasic were in the cockpit. One of the crew members, Tom Sheary, told them he understood the reason for the hijacking, but could not understand how they could harm the hostages if their demands were not met (Tr. 1619). Both Matanic and Vlasic said "well you don't understand. It is to be condoned because if you did understand the seriousness of our position you would understand that that would have to be done" (Tr. 1619).

The topic of the conversation appeared to be mooted when, at about 11:00 P.M. (E.D.T.), Mrs. Busic's voice finally came over the radio (Tr. 1620). Their mission had been a success, and their message had been published by the major American newspapers. There had only been one hitch. The bomb they planted at Grand Central Station had exploded and killed a member of the New York City Bomb Squad, Brian Murray (Tr. 1621).

After this message was relayed to the hijackers on the plane, they asked that Julianne Busic be permitted to return to the plane. But the French refused to permit her to do so (Tr. 1622). This refusal provided another occasion for terrorizing the passengers. The hijackers came back to the passenger section of the plane, and told the passengers:

"[W]e are all in this together—the five of us, and if we can't be all together we're going to kill

¹⁰ Although Mrs. Busic's fingerprints, and those of her husband, were all over this document (Tr. 2510-2511), Mrs. Busic denied she had taken it aboard the aircraft (Tr. 3683).

you * * * Julie is part of us and she is not here now, so we are going to kill you" (Tr. 4789).

All of the sadistic threats to the passengers by Busic and the others were empty ones, because, as the hijackers told their captives just before they surrendered at 2:30 A.M. (E.D.T.), on Sunday, September 12, 1976, the bombs were not real. "They were fake. Just clay. * * * [T]hey are all fake." And to prove it, Busic said he would set one off. "And he just set it off and nothing happened" (Tr. 1624, 4790).

B. The Death of New York City Police Officer, Brian Murray

Unlike the devices on board T.W.A. Flight 355, the device planted in Grand Central Station was real, and, if one believes the testimony of Zvonko Busic, it was constructed by an amateur who had only recently purchased a do it yourself manual. According to Mr. Busic, sometime in March, 1976, he purchased a copy of the Anarchist Cookbook, which contained formulas for explosives (Tr. 2890-2891): "My life was threatened at this time. I thought the book might help me" (Tr. 2890). In April, 1976, he purchased the dynamite for the bomb that killed Officer Murray. This occurred quite accidentally while he was sitting in a bar in New York City. The fantastic story, in which he is obviously covering up for someone, is best told in Busic's own words (Tr. 2892-2894):

"So there two people who were sitting on the table—because I had a be[ard] or something, I don't know, they turned to me and they told me, 'Well, you look like a revolutionary.'

I didn't want to discuss anything about revolution so I said, 'I am. I—you look like a Mafia.'

Because they were dressed somehow in dark complexion or something. And I just replied the same way they addressed me.

So—then they said, 'Well, we are.'

Well, I said, 'If you are, you must be dealing with illegal stuff.'

One of them said, 'Yes. We have everything. What do you need?'

I said, 'Well, I don't really need anything.'

* * * * *

Well, then I left. I went to toilet. And before I returned back, one of these fellows came after me and asked me, "Were you serious about that illegal stuff because we do have some if you have the money.'

And I said, 'Well, I do have money. What do you have?'

And I—he said that they had some dynamite. I said, 'Well, what do you ask for it?'

And he told me the price. He said—I believe he said \$250. And I told him, 'Well, I will give you \$200 for it if it is worth anything.'

And so—and he said, 'F. . . Let's make business.' "

The "Mafia man" then took out a shopping bag and handed it to Basic, who "just opened the shopping bag and saw there was something wrapped in the plastic and it had a little smell" (Tr. 3135). Although he did not know what it was, Basic, then unemployed, whipped out \$200 in cash and paid the "Mafia man" (Tr. 3135):

"Q. Weren't you concerned that he might be giving you something other than he told you it was?

A. It could have been some type of sausage too.

Q. What, sir?

Q. It could have been some type of sausage instead of explosive.

Q. Weren't you concerned about that?

A. Not in particular, no."

The dynamite was stored for approximately three months in the one room apartment which was fifteen feet by twelve feet (Tr. 3008) that he shared with Julianne (Tr. 3142). He first put it under the bathtub (Tr. 3143), then in a clothing cabinet under old shoes, to which Julianne had access (Tr. 3144), and finally in a hole in the bathroom wall (Tr. 3145).

Sometime in August, 1976, in his apartment, he constructed the bomb (Tr. 2895) which was so "very important" to the success of the hijacking (Tr. 3154). The bomb was like a "suicide bomb", if someone pressed the switch "it would explode and kill the persons instantly". Although Busic did not know what kind of "explosive" he was dealing with—"I didn't have any knowledge at all about it"—he assumed it would be a powerful explosive (Tr. 2905). After constructing the bomb, Busic personally placed it in a locker at Grand Central Station on the morning of the hijacking (Tr. 2911), which he had been planning for about a month (Tr. 2911, 2904).

The discovery of the bomb on the night of the hijacking followed the transmittal of the information contained in the note handed to Captain Carey (Tr. 1513). That

note said that the hijackers had left in locker 5713 at Grand Central Station a bomb identical to those they were carrying on the plane, along with further instructions regarding the publication of propaganda leaflets. Some time around 10:15 P.M., some two hours after the plane had been hijacked, the New York City Police Department's Bomb Squad arrived at locker 5713 and located the pot bomb.

Along with the bomb, Police Officer Brian Murray, a member of the bomb squad, removed a light blue envelope which Busic said he had also placed in the locker (Tr. 2942-2943), and turned it over to Special Agent Luker of the F.B.I. (Tr. 1961). One of the documents inside the blue envelope was the second note with the demands of the hijackers (Gov. Ex. 19). It read as follows (Tr. 1974):

"Here are the demands which must be immediately met, one, both of these texts must appear in their entirety in tomorrow morning's edition of the following newspapers: New York Times, all three editions; Los Angeles Times; Chicago Tribune; International Herald Tribune; and Washington Post.

Two, at least one third of each text must be printed on the first page of the first section. The remainder in the first section.

Three, through a prearranged code word we shall hear if these demands have been met by tomorrow deadline. If they have not been met, a second timed explosive device which is likewise in a highly busy location shall be activated. In the event these texts are printed as per instructions, this device will be deactivated.

Four, the fate of many people hangs in the balance if any attempts whatsoever are made to

circumvent our instructions. Fighters for Free Croatia."

On this typewritten document were fingerprints of the defendant Julianne Basic (Tr. 2493).

The two other documents in the envelope were the "two texts" which the note indicated must be published the following morning. One was an eight page document entitled an "Appeal To The American People" (Gov. Ex. 20, Tr. 1962), and the other was entitled "Declaration of the Headquarters of the Croatian National Liberation Forces" (Gov. Ex. 22, Tr. 1962). Julianne Basic's fingerprints were all over these documents as well (Tr. 2503-2509).

After the documents were removed, the bomb itself was carefully taken from Grand Central Station at about midnight on September 10, 1976, and transferred to the Rodman's Neck Pistol Range on City Island for examination (Tr. 2088). Although the bomb could have been detonated without risk to anyone (Tr. 2096), the members of the bomb squad felt they had an obligation to try to defuse it in order to find out the nature of the similar explosives which the hijackers' original note said were on board the plane (Tr. 1513). As Sgt. Terrence McTigue, one of the surviving members of the bomb squad, explained (Tr. 2092):

"[T]he device in our possession was a sample which was the type that was on the aircraft and if the hijackers' demands were not met we understood the threat to be that the aircraft would be blown apart and presumably the passengers would be killed. Based upon this we realized that information regarding the device itself was critical, so that the personnel who were negotiating with the sky jackers could make logical and intelligent

dealings, dealing from a point of view of information rather than from ignorance. We were concerned and felt duty-bound to provide the negotiators with information that would help, and that was information such as how was the device designed to operate, will the device in fact operate as designed, did it contain a low order powder or high explosive material, was it a booby trap, would it detonate instantaneously, was there a time delay, if so how long, did the explosive device in fact have the power to destroy an aircraft, or in our opinion could an aircraft possibly sustain the explosion of 3 or 4 of these devices without crashing. All of these things we felt would have been beneficial to the people negotiating at that point."

While they were attempting to defuse the bomb, or "render it safe" (Tr. 2096-2097), "a violent explosion occurred, a tremendous flash of light occurred" (Tr. 2142). Brian Murray, a twenty-eight year old member of the bomb squad was killed almost instantly (Tr. 2308-2313). Sgt. McTigue and other members of the bomb squad survived the explosion, although they were severely maimed (Tr. 2143).

Although it is difficult to prove, we believe that it was the death of Officer Murray, which was publicized, which delayed the code for which the hijackers were waiting so anxiously. Whoever had the responsibility of sending the message that would result in the surrender of the hijackers apparently realized the serious implications of Officer Murray's death, and decided not to send the code word. Of course, at the trial, at which he attempted to take full responsibility for the hijacking, and cover-up for anyone who may have been involved, the defendant Busic would deny there was any code word at all (Tr. 3113), despite the fact that he told Captain Carey that

he would not surrender until the code word was received, that the note in the locker referred to a code word, and that he put the passengers and crew through twelve hours of mental torture and anguish waiting for the code word.

C. The Defense

The strategy of the defense, simply stated, was this: Although all four defendants, and a fifth who plead guilty, were caught red-handed, no one was guilty. Mr. Basic, although legally sane, and not suffering from any "mental disease, illness, or defect", was acting "out of psychological necessity, not free choice" (A. 344-347). Mrs. Basic "never made a conscious decision to accompany Zvonko on the flight" (Br. 14), and the other three defendants, including the defendant Vlastic who plead guilty, had no idea that the plane was to be hijacked until Zvonko Basic had seized control of the aircraft (Tr. 3016-3017). They later followed Basic's orders because they thought, if they did not, he would blow up the plane. In short, no one was guilty of an ingeniously conceived and perfectly executed plan to hijack the aircraft.

When Judge Bartels refused to accept the proposition that someone who is legally sane is to be absolved from criminal responsibility because he acted out of "psychological necessity, not free choice", the defense strategy still largely consisted of an effort to blame everything on Zvonko Basic. Mr. Basic took the stand, allegedly in his own behalf, and confessed to his participation in the hijacking of Flight 355. Although his brief suggests there was a serious issue as to whether he acted knowingly and wilfully, i.e., whether he deliberately performed acts which he knew were in violation of law (Br. 41), Basic admitted that he knew what he was doing

was illegal (Tr. 2995), and that, prior to the hijacking, he read the air piracy statute, a copy of which was found in his apartment (Tr. 3162). The obvious purpose of Basic's testimony, therefore, was to try to paint a sympathetic picture of himself and his motives for committing the offense (Tr. 2830-2872)¹¹ and to exculpate his accomplices, particularly Matanic and Pesut, and anyone else who may have been involved.

Mr. Basic's effort to exculpate his wife, Julianne, was the hardest, since he not only had to admit that she helped him with the initial research in discovering the type of plane from which leaflets could be dropped (Tr. 3015, 2888),¹² but also her fingerprints were found all over each of the three documents accompanying the bomb that killed Officer Murray (Tr. 2493, 2503-2509), including the demand note which referred to a "second timed explosive device which is likewise in a highly busy location" (Tr. 1974). And Mrs. Basic herself admitted that she was aware prior to boarding the plane with a one-way ticket to Chicago in the name of Mrs. T. Lubin, that her husband intended to hijack the plane (Tr. 3634), that he intended to use false explosives (Tr. 3678), and that she saw the note and accompanying texts found in the locker with the bomb that killed Officer Murray (Tr. 3594). She nevertheless went along because she was afraid she would never see Mr. Basic again (Tr. 3597). Accordingly, the hard evidence of Julianne Basic's involvement was too overwhelming even for Mr. Basic to

¹¹ Basic obviously did not expect an acquittal. But as his attorney told the jury in his opening statement, he would ask for a verdict which "may embody guilt on some lesser charge" (Tr. 3145). Although he did not say so at the time, the "lesser charge" counsel had in mind was interference with the flight crew in violation of 49 U.S.C. § 1472(j) (Basic Br. p. 46).

¹² Mrs. Basic discovered that a Boeing 727 was the only one that had windows that could be opened (Tr. 3542).

overcome. Moreover, his story regarding the involvement of the others would flounder on his post-arrest confession, the inherent implausibility of his story,¹³ their own post-arrest confessions, and most of all, on the hard evidence of their participation in the hijacking.

Specifically, Mr. Busic's far-fetch tale, which dovetailed with testimony of Matanic and Pesut, was this: About a week or two weeks before the hijacking Busic first spoke to Petar Matanic and Frane Pesut, separately, about the flight to Chicago (Tr. 2921, 2925). The story he told each of them was essentially the same. He was planning a secret trip to Chicago to bring leaflets to a meeting there and asked Matanic and Pesut to help him carry leaflets (Tr. 2921):

"I told him there are going to be people at that meeting and they are going to carry these leaflets farther and these leaflets are going to end in Croatia and that was the purpose why he should not talk to anyone because this meeting was in very large secrecy, very great secrecy."

Pesut and Matanic agreed to go along with this secret mission to transport leaflets to Chicago. Matanic allegedly had some qualms about the expense (Tr. 2926). As Matanic explained it (in his own testimony): "I mention to him I believe that I am * * * unemployed and that I don't have any—that much money. If it involves money, that I can't—which he [Busic] indicate to me, you not have to worry * * * about any money" (Tr. 3836-3837).

¹³ We shall not again detail here the ludicrous story about the purchase of the dynamite, which Busic wasn't sure was sausage or dynamite, from a "Mafia man" he met in a bar. See, *supra*, pp. 14-16.

Subsequently, on the night before the planned hijacking, after purchasing five one-way tickets in assumed names for himself, his wife, Pesut, Matanic and Vlastic, (Tr. 2926-2927), Basic summoned them all to a dinner meeting at the Top of the Park Restaurant, at the Gulf and Western Building (Tr. 2928). The dinner for the five cost about \$100.00, for which the allegedly impoverished and unemployed Mr. Matanic paid in cash (Tr. 3068).¹⁴ But, according to Basic, there was no discussion at all about the flight to Chicago the following night. And to prove it, the defendant Matanic called as a witness a waiter from the Top of the Park Restaurant, who testified that the five hijackers behaved "like ordinary people", and that he did not see anything special (Tr. 3786).¹⁵

After the dinner, Basic spoke separately to Matanic and Pesut (Tr. 2930, 2932). Matanic allegedly asked Basic who "the other people were at the table" (Tr. 2930), although Matanic himself would admit that he knew everybody there—except for Pesut (Tr. 3857-3858). Basic assured Matanic that there was nothing to worry about, and apparently told Matanic to come by his apartment later that evening. Matanic came by Basic's apartment, picked up the leaflets and his one-way ticket to Chicago in the name of S. Radic. According to Basic, he and Matanic had a brief conversation about "the proceeding the next day at LaGuardia Airport, and I gave him the airplane ticket also, on that occasion" (Tr. 2932).

Later that evening Pesut, also acting pursuant to Basic's post-dinner instructions (Tr. 2932), came by Basic's apartment to pick up his leaflets and one-way ticket to Chicago in the name of T. Hoss (Tr. 2933-2934).

¹⁴ The one-way ticket to Chicago, which Matanic allegedly could not afford, cost approximately \$105.00 (Tr. 3064).

¹⁵ The waiter was one of the 49 witnesses that Matanic and Pesut claim made this a close case (Br. 55).

Basic explained to Pesut that the ticket was not in Pesut's name "because if anyone follows us from the Yugoslav Secret Service or anyone else, they couldn't discover that meeting [in Chicago] which was a top secret for the Croatian cause" (Tr. 2935). And to be doubly sure, Basic gave Pesut "a name and address in the Bronx, or somewhere, to write in his own handwriting, to put in the suitcase * * *" (Tr. 2935).

The following day, after he placed the bomb in the locker at Grand Central Station, Basic and his wife Julianne proceeded to LaGuardia Airport at about 5:00 P.M. According to Basic, they had two suitcases and two handbags and Julianne had her purse with her. Both suitcases and two handbags were packed with the leaflets that were ultimately dropped over London and Paris (Tr. 2937). They also carried in a shopping bag the iron pots which were used to make devices which they told the pilot and crew were real bombs (Tr. 2930). Although Basic told Captain Carey during the hijacking that "other members of his crew carried through electrical wires, switches [and] the components" used to construct the pot bombs on the plane (Tr. 1534), Basic claimed at trial that he himself carried those components on to the plane (Tr. 2938-2939). The other three hijackers arrived, separately, after the Basics (Tr. 2942).

About three to five minutes after the plane left the ground, Basic went to the lavatory to construct the device which he wore around his neck. He then handed the note regarding the hijacking to a steward, Tom Van Dorn, and told him he would enter the cockpit about two minutes later (Tr. 2945). About three to five minutes later he asked Julie to come into the cockpit, and gave her a note to give Marc Vlasic, instructing him "how to do the bombs with the pots" (Tr. 2949). According to Basic, up until that moment, neither Vlasic (who plead

guilty), or his other co-defendants, had any idea that the plane was to be hijacked (Tr. 3017-3018).

Busic also had a conversation with Matanic. He ordered him to stand between the two doors behind the cockpit "to put his hand in his pocket pretending that he had a gun or something". He told Matanic the situation was very dangerous, that "we were proceeding to Montreal" and that: "He has to do what I told him or there might be a catastrophe" (Tr. 2950). And for Matanic's "protection", he handed him a tear gas gun (Tr. 3171). Marc Vlasic was also handed such a device (Tr. 3171). Busic then went to the back of the plane and saw Pesut sitting with the pot bomb, "he was shaking", and he asked Busic, "what is this all about". Busic responded (Tr. 2953), that he had misled Pesut about the purpose of the trip to Chicago (Tr. 2953-2954).

"We are going on a mission for Croatian national cause. And you have no choice now because you can't go, as nobody else can go off the plane. You—all you can do best for everybody else and for Croatian cause to remain sitting and hold that pot. It is a bomb, a live bomb. You know me, and nothing can happen at all. There will be no danger whatsoever if you just follow my instructions as you have promised me long before when we were talking about helping some Croatian cause in general."

Accordingly, the defense of Matanic and Pesut, based on Busic's testimony, and their own, was that they had no knowledge of plans by Busic to hijack Flight 355, and that whatever they did on the plane they did because of fear that Busic would blow it up. Of course this story, implausible to begin with, crumbles in the face of the evidence regarding their conduct aboard the plane which we have already detailed and which is based largely on the testimony of Captain Carey and a passenger

who kept a contemporaneous written account. Moreover, after their arrest, both Matanic and Pesut confessed to their involvement in the air piracy (Tr. 4330-4341, 4472-4485), although both denied knowledge of the live bomb in Grand Central (Tr. 4372, 4544).

Indeed, Matanic, who said at trial, "I assume I didn't know nothing" about the hijacking (Tr. 3926), and could not remember making any incriminating statements attributed to him (Tr. 3974, 3975), admitted he never told the F.B.I. agent that he had been tricked into boarding the plane and coerced into participating in the hijacking (Tr. 3966).¹⁶ Nor did he ever tell any of the passengers that he had no such prior knowledge of the hijacking (Tr. 4004).

Moreover, Busic himself told the F.B.I. agent who conducted the F.B.I. interview that Vlastic, Pesut and Matanic were aware that the actions in support of Croatia, for which he had enlisted them, involved the "take-over" of Flight 355 (Tr. 4591), although they had no knowledge of the live bomb at Grand Central Station (Tr. 4559, 4560). Indeed, Busic himself could barely keep his story straight. Thus, at one point during Busic's cross-examination about his post-arrest statement implicating Matanic and Pesut, this revealing colloquy took place (Tr. 3037):

Q. What did you say?

A. I told him that they were—they were aware that this mission will involve a takeover from New York to Chicago.

Q. Takeover what?

¹⁶ The defendant Pesut said he did make such a post arrest statement, contrary to the testimony of the interrogator (Tr. 4482, 4485), but that Pesut was not sure he was understood (Tr. 4298).

A. Take—takeover with the plane. Take—

Q. In other words—

A. Take off.

THE COURT: Take-off. He means take-off.

Mr. Basic, aided by the interruption of Judge Bartels, who is now accused by Matanic and Pesut of having been on the prosecution team (Br. 53), still could not utter correctly the words exculpating them. Several pages later in the transcript, he slipped again (Tr. 3039-3040):

[W]hen I was questioned, what kinds of knowledge my co-defendants had prior, before entering the plane. I told them that all they knew it was that there was some mission for the Croatian National because that was involved and that *we were going to take over from New York to Chicago*. They questioned me again what else they knew. I said they did not know of anything else except that mission, however, my wife Julie had some ideas that I might try to convince the pilot to throw out some leaflets through the window before we land in Chicago.

D. The Conduct of the Trial Judge And the Verdict of the Jury

This was an exceedingly difficult case for any judge to preside over. The four defendants were represented by a total of seven lawyers who bombarded him with frivolous motions, including one "to permit the selection of a petit jury half of whose numbers are Croatian" (A. 176). They also made disingenuous arguments, repeatedly ignored his rulings and at times their conduct bordered on contempt (Tr. 3086, 3111-3112). Moreover, the courtroom was packed almost daily with friends, relatives and supporters of the defendants, men, women,

even children (Tr. 1436-1437), and members of the clergy. Indeed, while the jury was deliberating, and returning for instructions, in the front row of an already packed courtroom were six Croatian nuns (Tr. 5947). Judge Bartels, throughout all this, managed to conduct an orderly trial that was much fairer to the defendants than the United States.

The defendants, however, particularly Matanic and Pesut, have launched a vicious attack on the conduct of Judge Bartels, alleging in substance that "the judge and government became a team" (Br. 53). Of course, faced with a case in which the evidence is overwhelming, unable to find a single error of any magnitude in a record which exceeds 6,000 pages, or a single hole in an eighty-one page charge on novel and difficult issues of law (A. 592-613), it is not surprising that this is Point One of the brief filed by Matanic and Pesut. We, of course, intend to answer this claim in detail in the argument part of this brief.

The most significant red flag, however, to the baselessness of the assault on Judge Bartels, is the verdict of acquittal returned as to Matanic and Pesut on the most serious charge of the indictment—the charge of air piracy resulting in death, contained in Count One.¹⁷ The reason for this was Judge Bartels, who bent over backwards at trial in admitting evidence, and bent over even harder in his instructions to the jury. Indeed, he resolved almost every dispute in their favor, and none was more critical to the defendants than the instructions on air piracy

¹⁷ Our "teammate" also accepted the defendants "tortured and hyper-constricted reading" of the venue statute and dismissed the indictment prior to trial. *United States v. Busic*, 549 F.2d 252, 256 (C.A. 2, 1977). He was, of course unanimously reversed. Moreover, as we show in our brief on appeal from the sentence he imposed on Julianne Busic, he strained beyond reason to make her eligible for early parole.

resulting in death and the instructions on eyewitness identification.

The evidence clearly established that each of the defendants was guilty of air piracy and there was clear and direct evidence linking Zvonko and Julianne Busic to the live bomb that killed Officer Murray. There was, however, no direct evidence linking the defendant Matanic to its construction or placement. And, in their post-arrest confessions, both Matanic and Pesut denied any knowledge that Busic had planted the bomb. There was, however, eyewitness testimony linking Pesut to the planting of the bomb; for, at 1:30 A.M. on September 8, 1976, two days before the hijacking, a man speaking broken English asked two employees of O'Henry's Film Works in Grand Central Station whether the lockers in the area were safe to store items (Tr. 2375-2376, 2322-2324). Subsequently, on September 13, 1976, after the hijackers were arrested, pictures of three of the male participants appeared in the New York Post (Tr. 2377). And both recognized Pesut as the man who, in the early hours of September 8, 1976, was asking about the lockers (Tr. 2377, 2325). They then called the New York City Police.

Obviously, if in order to convict Matanic and Pesut of air piracy resulting in death it had to be shown that they knew about the bomb or participated in planting it, Matanic had a clear shot at an acquittal. And Pesut, too, would have a chance if he could somehow undermine the effect of the eyewitness identification. Here Judge Bartels came to the rescue. He rejected as "too stiff against the defendants" (Tr. 5211) ¹⁸ the traditional common law rule that an aider and abettor may be held re-

¹⁸ "I wanted to be particular to see that the defendants got a fair charge" (Tr. 5212).

sponsible for a death resulting from an act undertaken in furtherance of the felony even if the aider and abettor did not have any knowledge that his accomplice would undertake the act resulting in death. *People v. Wood*, 8 N.Y. 2d 48, 52 (1960); *United States v. Heinlein*, 490 F.2d 725, 735 (C.A.D.C. 1973).¹⁹ Instead, he instructed the jury that the United States had to prove beyond a reasonable doubt that a particular defendant was guilty of air piracy and either (1) participated in the placement of the live bomb, (2) knew of its existence before boarding the plane and that it was planted to further the hijacking, or (3) could foresee that a live bomb on the ground would be so utilized (A. 607-A-607-B).²⁰

Judge Bartels did not stop there. Although he need not have given any charge at all on the risk of misidentification by an eyewitness,²¹ he proceeded to devote six pages of his 81 page charge to that issue (A. 627-632). Judge Bartels told the jury that "[i]dentification testimony must be examined and scrutinized with great care" (A. 627), he detailed the factors to be considered in evaluating the validity of the initial identification (A. 630-632), he explained to them an initial identification from photographs may still present "some danger that the witness may make an incorrect identification", and that if

¹⁹ The request to charge filed by the United States embodied this rule (A. 521).

²⁰ The instruction went beyond even the modification of the common law rule that N.Y. Penal Law, § 125.25 has effected. Under Section 125.25, a defendant can assert as an affirmative defense, on which he bears the burden of proof, "that he not only had nothing to do with the killing itself but was unarmed and had no idea that any of his confederates was armed or intended to engage in any conduct dangerous to life." Hechtman, *Practice Commentaries*, 39 *McKinney's N.Y. Penal Law*, p. 401.

²¹ *United States v. Evans*, 484 F.2d 1178, 1187-1188 (C.A. 2, 1974); *United States v. Marchand*, — F.2d — (C.A. 2, Aug. 22, 1977), Friendly, J.

there was a mistaken initial identification "then you must answer the question whether thereafter the witnesses retained in their memory the image of the photograph rather than the image of the person actually seen" (A. 631). He concluded by telling the jurors that even if the witness was positive, it did not relieve them of the "duty to carefully consider identification testimony, especially when it is the only testimony which supports the claims of identification", and that if "after examining the testimony of these witnesses and all the circumstances under which they identified Pesut you have a reasonable doubt as to the accuracy of their identification" it should not be considered "for the purpose of placing Pesut at Grand Central Station at the time in question" (A. 632).²²

Under these circumstances, with these instructions ringing in its ears, the jury acquitted Matanic and Pesut of air piracy resulting in death after specifically seeking a clarification of the charge on that offense (Tr. 5903). Prior to returning the verdict the jury had asked to have reread the testimony of the two eyewitnesses (Tr. 5988), the testimony of Matanic and Pesut, and the testimony regarding their post-arrest confessions (Tr. 5918, 5919, 5952). Both the trial testimony and their confessions

²² The instruction, as a whole, was far stronger than that requested by the defendants (A. 397-407). These were not the only times he bent over backwards for the defendants. Although it is contrary to settled law and Section 3501 (A. 559-560), he submitted the issue of voluntariness of the Pesut and Matanic confessions to the jury under a "reasonable doubt" test for admissibility (A. 620). Moreover, over our objection he submitted the issue of venue to the jury (Tr. 1353), contrary to reason and law. Korman, *Commentary: Criminal Venue*, 43 Brooklyn Law Rev. 1197 (1977), and the instruction he gave was the strongest possible language for the defendants (A. 588-590).

contained denials of any knowledge of the bomb that killed Officer Murray.²³

ARGUMENT

PART I

The Arguments Advanced by Zvonko and Julianne Basic Are Without Merit.

Point I

The District Court Properly Held That Evidence Found In A Handbag Which the Defendant Julianne Basic Left Aboard the Hijacked Airliner Was Admissible.

A. Introduction

1. The first point of the brief filed on behalf of Zvonko and Julianne Basic is that the district court committed reversible error (as to Julianne) in failing to suppress evidence found in a handbag which belonged to Mrs. Basic. The claim is without merit, and is buttressed by an incomplete factual statement which omits critical details regarding the seizure and search and the nature of the evidence found.

Julianne Basic was the first of the hijackers to be arrested. She had left the plane while it was on the ground in Paris after the hijackers had waited some

²³ The only other testimony the jury asked for was Julianne Basic's testimony, from the time she said she went to the library (to help find a plane that had windows from which leaflets could be dropped) to the time she said she boarded the plane (Tr. 5953). In this testimony she admitted she knew the "bombs" on board the aircraft were false (Tr. 3678), and she said she read the note found in the locker in Grand Central Station which referred to "a second timed explosive device which is likewise in a highly busy location" (Tr. 3594, 1974).

eight hours for the code word which never came. She was to telephone several people Basic trusted to determine whether the demands contained in the note in the locker in Grand Central Station had been met. Mrs. Basic was never permitted to return to the plane (Tr. 1622).

When she left Flight 355, however, she did not take her handbag; instead she left it in the aircraft which was still under control of the hijackers. As Mrs. Basic put it (Tr. 3683): "[W]hen I left the airplane, I left all my stuff on the airplane." Needless to say, the handbag, along with other luggage, was seized by the French and turned over to the F.B.I. at the same time the defendants were arrested (Tr. 2422-2425).

When Mrs. Basic's handbag was searched by the Federal Bureau of Investigation, a two page document (Gov. Ex. 40), which contained a diagram of a Boeing 727, along with other information about the plane, was found (Tr. 2437). Although she would deny she brought the document on board the plane (Tr. 3683), Mrs. Basic's fingerprints, along with that of Zvonko Basic, were all over the document (Tr. 2510, 2511). Mrs. Basic's handbag also contained library cards (Gov. Ex. 38-39), which led the F.B.I. to the main branch of the New York Public Library and to *Jane's All The Worlds Aircraft*. The document found in Mrs. Basic's handbag was copied from pp. 274-275 of the 1973-1974 volume of *Jane's* (Tr. 2468-2472). Moreover, fingerprints of Mrs. Basic were also found in a 1974-1975 volume of *Jane's* in the New York Public Library (Gov. Ex. 42). The part of that book containing the information on Boeing 727s, commencing on page 281 had been torn out.²⁴ Julianne's fingerprints were on

²⁴ Similar information had been torn out of the N.Y. Public Library's volume of *Jane's* going back to 1966 (Tr. 2457). But Judge Bartes, our "teammate", refused to admit that evidence (Tr. 2461).

eight different pages of the volume (Tr. 2518); one of those was page 808, in the index. Approximately two thirds down the page was "the 'M' section of the index, model 727 (Boeing) and it indicates that that material on the 727 is on page 281" (Tr. 2519).²⁵

2. Mrs. Busic moved to suppress the evidence found in the handbag on the ground that it had been searched without a warrant and that her consent to the search was invalid because she was asked to do so after she had been given her *Miranda* warnings and requested the assistance of counsel (Tr. 642-643). The evidence at the suppression hearing, at which Mrs. Busic did not testify, established that she was not questioned about her involvement in the hijacking after requesting counsel (A. 259), and that she then took a nap (A. 280). About an hour later she was asked if she would consent to the search of her bags and, identify them. She consented to the search after being fully apprised of her right not to consent, and after signing a consent to search form (A. 55), which was witnessed by two F.B.I. agents. The agents, who had been scrupulous in their efforts on that day,²⁶ had instructions not to search the luggage without a warrant unless the consent of the defendants was obtained (Tr. 1835).

The district court judge, in his initial ruling, held that the identification of the luggage and her consent to search were involuntary because it was "after she refused to answer any questions or to sign the [Miranda] advice of rights form and had requested a lawyer" (A.

²⁵ Mrs. Busic's brief does not allude to this evidence, although it was referred to in the motion to suppress (A. 322), because it undermines her claim that no evidence was introduced that she knowingly and voluntarily planned the hijacking (Busic Br. p. 13).

²⁶ They had obtained warrants for the arrest of all of the defendants, on a Sunday afternoon, although no warrant was required. (*United States v. Watson*, 423 U.S. 411 (1976)).

280). Subsequently, however, he concluded that a search could have been undertaken without a warrant and that the evidence obtained as a result of the search would be admitted (A. 297, A. 392).

We believe that neither Mrs. Basic's consent nor a warrant was necessary to search the handbag which she left on the plane when she went to make a call to determine whether the demands of the hijackers had been met. Even if we are wrong, we believe that the district court erred when he ruled that, as a matter of law, a defendant who declines to answer questions regarding her participation in an offense, may not be asked to consent to a search of her handbag or other premises. We also believe, that even if the district court was correct, the evidence should not have been excluded because it would have been inevitably discovered. Moreover, we believe that the admission of this evidence is harmless because its principal significance was in undermining the credibility of the defense, for which it was admissible in any event, rather than to bolster an already overwhelming case.

B. A Search Warrant Is not Required to Search an Item of Personal Property Which a Perpetrator Leaves at the Scene of a Crime.

Only last term, the Supreme Court observed that the Warrant Clause of the Fourth Amendment, and the cases construing it, reflect a fundamental purpose "to safeguard individuals from unreasonable governmental intrusions of legitimate privacy interests, and not simply those found inside the four walls of the home." *United States v. Chadwick*, -- U.S. --, 97 S. Ct. 2476 (1977). There the Supreme Court held that a warrant was necessary to search a double-locked footlocker which the defendant had in his possession in a public place (97 S. Ct. 2483):

By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his possession in this manner is due the protection of the Fourth Amendment."

No one, however, would suggest that a burglar or trespasser, who locks the doors of the home he is burglarizing against intruders, has any legitimate privacy interest to be protected by the Fourth Amendment. *Jones v. United States*, 362 U.S. 257, 267 (1960); *United States v. Cole*, 416 F.2d 827 (C.A. 4), *certiorari denied*, 397 U.S. 1027 (1969). Nor, do we believe, does that burglar have any legitimate expectation of privacy in a wallet that he may drop after having departed premises to which he had no right to return. Cf. *United States v. Parizo*, 514 F.2d 52 (C.A. 2, 1975).

Surely Julianne Busic's position on that plane was no different. She was a participant in a hijacking, the unlawful seizure of an aircraft, who left her handbag on the plane when she went to make a call in furtherance of the conspiracy, and she had no lawful right to return to the plane. Indeed, she was arrested before she could try (a risk she must have anticipated).²⁷

The issue is not whether she abandoned the property, in the sense of relinquishing all right and title to it. Such a standard reflects a test which was appropriate when proprietary rather than privacy interests were thought to be paramount in determining the scope of the protection of the Fourth Amendment. *United States*

²⁷ The fact that Mrs. Busic did not return to the plane because she was arrested does not detract from our argument. *United States v. Parizo*, 514 F.2d at 54, n. 1.

v. *Parizo*, 514 F.2d 52, 53-54 (C.A. 2, 1975). *United States v. Cowan*, 396 F.2d 83, 86-87 (C.A. 2, 1968). As the Court of Appeals for the Fifth Circuit observed in sustaining the search of an automobile which a defendant had abandoned while being chased by the police [*United States v. Edwards*, 441 F.2d 749, 753 (C.A. 5, 1971)]:

"Whether or not the facts reveal a complete abandonment in the strict property-right sense is not the issue. Mr. Justice Frankfurter in *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697 (1960), admonishes that it is unnecessary and ill-advised to import into this law of constitutional search and seizure the subtle distinctions of private property law. Mr. Justice Goldberg in *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed. 2d 684 (1965), stresses that the Fourth Amendment is not to be applied in a hypertechnical manner but with a common sense approach.

It seems clear by any good sound ordinary sense standard that Edwards abandoned any reasonable expectation to a continuation of his personal right against having his car searched under the circumstances, and thus lost his Fourth Amendment rights, and we so hold."

See, also, *Sartain v. United States*, 303 F.2d 859, 862-863 (C.A. 9, 1962); *United States v. Walton*, 538 F.2d 1348, 1354 (C.A. 8, 1976); *United States v. Parizo*, 514 F.2d 52 (C.A. 2, 1975). This reasoning is equally applicable here. Mrs. Busic surely abandoned any privacy interest in her handbag by leaving it on premises in which she had been involved in the commission of a crime. She could hardly expect that it would not be opened either by airline personnel or the French law enforcement officials. Moreover, the fact that the French turned the handbag

over to the United States law enforcement officials for use as evidence at trial did not give rise to the necessity for obtaining a warrant. (*United States v. DeBerry*, 487 F.2d 448, 451, n. 4 (C.A. 2, 1973)).²⁸

C. The District Court Erroneously Concluded That A Consent To Search Is Per Se Involuntary If Obtained After A Defendant Has Refused To Answer Any Questions.

Julienne Busic was the most educated and intelligent of all of the defendants and she was the only one who refused to answer questions after having been given her *Miranda* warnings. Moreover, she understood the obvious difference between speaking to the law enforcement officers about her involvement in the hijacking and consenting to a search of the handbag. Indeed, if one accepts her testimony, she had no reason to believe that any incriminating evidence would be found in her handbag, since she did not believe the xerox copies of the pages from *Jane's* were in her pocketbook (Tr. 3683). While the library cards were there, it is doubtful that she would have anticipated at that point that they would lead to the

²⁸ We believe that, if we are wrong in our analysis above, that search of the handbag was valid without a warrant or her consent, because it was incident to a lawful arrest. The defendant and her handbag were turned over to United States law enforcement officials at the same time. Had the French returned the handbag to her a second before she was turned over to the F.B.I., the agents could have taken it from her and searched it without a warrant. The fact that they did not go through this exercise should not change the fact that the "seizure" of the bag was clearly incidental to the arrest of Mrs. Busic. Moreover, while the search was delayed until the next day, and *United States v. Chadwick, supra*, has been said to have cast doubt on the validity of such a warrantless delayed search, the holding is not retroactive. *United States v. Reda*, No. 77-1062, — F. 2d —, (C.A. 2, October 12, 1977).

discovery of her fingerprints in several volumes of *Jane's* in the New York Public Library.

These practical considerations aside, there is a significant legal distinction between questioning to elicit incriminating statements and a request for a consent to search. And it is this distinction that the district court overlooked in holding that a witness who asserts her *Miranda* rights may not be asked to consent to a search. A request for a consent to search does not touch the values reflected by the Self-Incrimination Clause that *Miranda* is designed to protect, "since the consent to search is not 'evidence of a testimonial or communicative nature.'" *United States v. Faruolo*, 506 F.2d 490, 495 (C.A. 2, 1974); *United States v. Lemon*, 550 F.2d 467, 472 (C.A. 9, 1977), and cases cited. Under these circumstances, the search would not have been per se invalid if the *Miranda* warnings had not been given. We believe it follows *a fortiori* that the consent was not per se unlawful because those warnings were given; the defendant chose not to speak about the crime, but agreed to consent to a search after being advised of her right not to do so. *People v. Ruster*, 129 Cal. Rptr. 153, 548 P.2d 353, 358-359 (Sup. Ct. Calif., *en banc*, 1976).²⁹

We recognize that, in addition to being asked to consent to the search, the defendant was asked to identify her luggage, although it would not have been difficult to determine to which hijacker a ladies handbag belonged. While we do not believe that this was the type of testimonial compulsion *Miranda* was aimed at, it suffices to say that no evidence was introduced by the United States

²⁹ Even if *Miranda* was applicable to a request to search, it does not follow that the brief resumption of "interrogation" to ask for a consent, if that is what it is called, is prohibited. See *Michigan v. Mosley*, 423 U.S. 96, 104 (1975).

that Mrs. Basic had identified the luggage. The fact that her library card was found inside it provided ample basis to connect it to her. Accordingly, even if the request for her to pick out her luggage, among which was included the handbag, be deemed testimonial compulsion (Cf. *Fisher v. United States*, 425 U.S. 391, 408-414 (1976), much less the kind of testimonial compulsion to which *Miranda* is directed, no fruit of that statement was used against her.

D. Since the Handbag Would Have Been Searched With a Warrant Had the Defendant not Consented, There Is No Basis for Suppressing the Evidence Found in it.

The law is clear that, even if evidence is obtained pursuant to an invalid warrant, or a consent which is later found to be involuntary, the evidence may nevertheless be admitted if it would have in all likelihood been discovered without the warrant, consent or other improper act. *United States v. Galante*, 547 F.2d 733 (C.A. 2, 1976), *certiorari denied*, — U.S. —; *United States v. Jarvis*, 560 F.2d 494 (C.A. 2, 1977). In *United States v. Gallante*, for example, a search was undertaken in reliance upon a warrant and consent which were later held to be invalid (547 F.2d 736, n. 1 and n. 2). In sustaining the admissibility of the evidence seized as a result of the search, Judge Meskill observed, in that part of his opinion that was joined by Chief Judge Kaufman and Judge Mansfield, that (547 F.2d at 740):

“As we noted above, it is not at all clear that the initial illegal search was the but-for cause of the subsequent seizure. Had the police never sought a warrant, or had their application for one been properly denied, they would in all likelihood have placed the Bristol Bargain Fair under sur-

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veillance. As we indicated above, a seizure growing out of such activity would have been entirely valid. The mere fact that an invalid warrant had been obtained will not, standing alone, invalidate a subsequent seizure."

Here, there was probable cause to search Mrs. Basic's handbag. The handbag belonged to one of the hijackers and had been carried on to the plane. There was plainly reason to believe that instrumentalities of the crime, or evidence linking the owner to it, would be found. Accordingly, but for her consent, a search would in all likelihood have been made with a warrant (A. 394). The law enforcement officials, who proceeded so scrupulously, should not be penalized because they relied on the consent of an intelligent woman who was obviously capable of understanding and exercising her rights. As the Court of Appeals for the First Circuit observed in a related context (*Leavitt v. Howard*, 462 F.2d 992, 998 (C.A. 1, 1972)):

We close with one general observation with regard to consent to search. If the police have over-reached and obtain oral admissions, they have received something they otherwise would not have. As to a search, on the other hand, if the only result of the apparent consent is a premature search, suppressing the evidence because of police reliance on a faulty consent has the effect of suppressing for all time what, but for misplaced reliance on an apparent consent, the police would have been entitled to find later. The indignant protest in petitioner's brief calls for what might seem a highly disproportionate penalty upon the state under such circumstances. *See generally*, Friendly, Is Innocence Irrelevant? 38 U. Chi. L. Rev. 142, 160-64 (1970).

E. The Admission of the Evidence, If Error, Was Harmless.

We recognize that, after characterizing the evidence seized from Julianne's handbag as significant, it may seem somewhat contradictory to suggest that the admission of the evidence was harmless. But, as a practical matter, as the trial developed, it was harmless.

There is no question that the direct case presented by the United States against Julianne Basic, without even considering the evidence derived from her handbag, was overwhelming. Mrs. Basic's fingerprints were all over the documents found with the bomb that killed Officer Murray; and we mean all of the documents, and not simply (as the defendant suggests [Br. 17-18]) the demand note containing the reference to a "second timed explosive device which is likewise in a highly busy location" (Tr. 1974). Moreover, she boarded the plane with a ticket in an assumed name, and she obviously participated in the hijacking. Indeed, even the passenger who testified that at one point, while the plane was on the ground in Paris, Mrs. Basic appeared "as frightened and terrorized as the rest of us" (Tr. 3470),³⁰ had no doubt that she was a willing participant in the hijacking (Tr. 3472). Moreover, contrary to a statement in her brief, unaccompanied by a reference to the record, there was no testimony "from several witnesses" that she attempted to persuade Zvonko Basic to surrender (Br. 18). Accord-

³⁰ Captain Carey testified that at one point on the ground in Paris all of the hijackers panicked and for a brief period there was total mayhem (See, *supra*, p. 12). Of course, since Mrs. Basic knew all along that the explosive devices on board the plane were fake (Tr. 3678), any fright she may have exhibited was due to the fear of an assault on the plane by the French, rather than that any harm would come to her because of any explosives on the plane.

ingly, unless Mrs. Basic testified, she had no chance whatever of an acquittal based on a defense that she "never made a conscious decision to accompany Zvonko on the flight" (Br. 14), that she did not voluntarily plan the hijacking (Br. 13), that "she did not know the nature of the plan" (Br. 15), or that she "had no knowledge about any live bomb" (Br. 18).

Of course, once she took the stand, she could have been cross-examined about the document in her bag, and her fingerprints on the volume of *Jane's* from which information on Boeing 727's had been taken out. *Harris v. New York*, 401 U.S. 222 (1971). This plainly went to the credibility of her story. Moreover, both Zvonko and Julianne Basic testified on direct examination about the trip to the New York Public Library (Tr. 2887-2888, 3537-3542). This testimony would have led to the discovery of the latter evidence.

Under these circumstances, while the evidence obtained from the handbag was significant—its major significance was in undermining the preposterous defense she put in, for which it was admissible in any event, rather than strengthening a case which was already overwhelming.

Point II

The Testimony of Dr. Diamond Had No Bearing On Any Valid Defense Which the Defendant Zvonko Basic Had Available.

1. On February 24, 1977, some six months following the return of the indictment, after telling this Court and the district court (in seeking a bail reduction) that Mr. Basic "is an acknowledged leader in the community—a man to whom others look with respect and admiration" (Br. 6-7, No. 76-3084) and that "his friends as well as civic and religious leaders in the community have no

reservations about his peaceful and non-violent behavior if released pending trial³¹(App. 39, No. 76-3084), the defendant filed an untimely notice, pursuant to F.R. Crim. P., Rule 12.2(b), of his intent to rely on a defense of an abnormal mental condition negating the mental state required for the offense charged in the indictment. The United States agreed to waive its objection to the untimeliness of the claim (A-237-240), despite the disingenuous reasons given by the defendant for the delay.³¹

The defendant then submitted, as part of an offer of proof, a report by a Dr. Diamond, dated March 15, 1977, which began (A. 344):

"I do not find the defendant insane or mentally ill in any sense of those terms. Psychiatric examination revealed intact sensory, perceptual, memory and intellectual functions. Volitional functions are, however, disturbed; but not, I believe, as a result of mental illness. There were no hallucinations, delusions or other psychotic manifestations elicited."

Dr. Diamond, then went on to say that Mr. Basic feared he would be killed, a fear which was realistic rather than paranoid, and he decided to perform "one last, meaningful, heroic act for the benefit of the Croatian cause". Mr. Basic "felt compelled to devote his remaining

³¹ The asserted reason for the untimely notice was that "pretrial preparation of a defense based on mental condition has been retarded by the fact that defendant has not been granted bail * * *" (A. 239). When Judge Bartels expressed skepticism about this excuse, Mr. Basic's counsel responded that the prosecutor could have discovered his intent to raise the defense by making a request for reciprocal discovery which would have resulted in the production of the psychiatric report (Tr. 98, Feb. 24, 1977). This psychiatric report that was produced was dated March 15, 1977, some three weeks after this statement was made (A. 344).

life to the accomplishment of an act which would bring attention of the entire world to the injustices imposed on his Croatian people. To do this, he planned the sky-jacking * * * " (A. 346). Accordingly, Dr. Diamond concluded (A. 347):

"In terms of an element of criminal intent implying the power of free-will, choice and decision as exercised by ordinary men, Zvonko Basic lacked, in my opinion, the capacity for such criminal intent. He did what he did out of psychological necessity, not free choice."

Dr. Diamond did not discuss his understanding of the term "criminal intent" nor did he say how the defendant's state of mind, which was *not* the product of "mental disease, illness or defect" prevented him from forming such a criminal intent. Indeed, Mr. Basic's lawyer, arguing in support of admitting this testimony, conceded that, even if credited by the jury, it would not provide Mr. Basic with a defense to a charge of interfering with the flight crew by assault, threats or intimidation (A. 462).³²

But there was nothing in Dr. Diamond's letter which suggested why his conclusion would provide Mr. Basic with a defense to air piracy, but not interference with the flight crew. In a later deposition Dr. Diamond tried to cover this hole in his letter (A. 504):

"Q. Doctor, are you aware that the standard of criminal intent under the air piracy statute is wrongful intent?

A. Yes, sir, I am.

Q. And does your opinion take account of that statutory definition?

³² This argument is again reiterated by the defendant (Br.43).

A. Yes, I believe that he was unable to appreciate or understand the wrongfulness of his acts."

Dr. Diamond had, apparently, never asked Mr. Basic whether he knew or appreciated whether his conduct was wrong. Had he done so, he would have obtained the following significant information which was elicited during Mr. Basic's cross-examination:

"Q. Did you know when you hijacked the plane that it was against the law to hijack a plane?

A. Yes. I knew that hijacking was against the law." (Tr. 2995).

* * * * *

"Q. Did there come a time, sir, that you obtained a copy of the federal law concerning hijacking of planes?

A. I believe I did, yes.

Q. And when was that?

A. Early in 1976, I believe." (Tr. 3162).

* * * * *

"Q. Mr. Basic, would you look, please, at what has been marked Government's Exhibit 55, and tell us if you recognize it?

A. Yes.

Q. You recognize it?

A. I think I do, yes.

Q. What is it?

A. It is law and anti-hijacking law, law concerning hijacking in particular." (Tr. 3163-3164).

* * * * *

After a long and confusing argument, at which Judge Bartels obviously was looking for an excuse to let in some of Dr. Diamond's testimony, he decided he would have to exclude . . . (A. 480):

THE COURT: I am perfectly willing for the doctor to testify that the defendant had an abnormal mental condition. That is his opinion.

MR. TIGAR: That is his opinion.

THE COURT: That is all.

MR. KORMAN: To what end?

THE COURT: To the end that he wasn't aware that his act was wrongful.

MR. KORMAN: That is not what—that is the defense of insanity, Judge.³³

THE COURT: I am afraid you are right. You are right. I don't think I can. I tried to make some concession to doctor—to Mr. Tigar, but I don't think I can. So my decision is I won't permit it."

We believe that his holding was plainly correct.

2. We need not engage here in a long or detailed discussion relating to the precise application and scope of the circumstances when "it is proper to introduce evidence of mental disease or defect bearing not on the defense of insanity, but rather upon the existence of the mental state required by the defense." Advisory Committee Notes, F.R. Crim. P., Rule 12.2(b). Although we treated that issue in detail in our memorandum below (A. 413-424), it is apparent from Mr. Busic's own admissions that he knew that what he was doing was legally wrong. Accordingly Dr. Diamond's testimony, flawed as it is, was admissible only if a defendant's belief that hijacking was morally right is a defense to aircraft piracy as defined in 49 U.S.C. § 1472(i). We believe that it is not.

³³ The defendant had, of course, expressly disclaimed any reliance on the defense of insanity (A. 435).

Section 1472(i) of Title 49 makes it an offense to commit aircraft piracy which is defined as "any seizure or exercise of control, by force or violence or threat of force or violence, or by any other form of intimidation, and with *wrongful intent*, of an aircraft within the special aircraft jurisdiction of the United States". The words "wrongful intent", as the defendant concedes (Br. 41), imply no more than the general *mens rea* required for any serious crime, i.e. that it was done "knowingly and wilfully". *United States v. Howard*, 506 F.2d 1131, 1133 (C.A. 2, 1976). Moreover, as the defendant correctly says, the critical phrase is wilfully, i.e., it must be established that he "perform[ed] acts which he knows are in violation of the law" (Br. 41). *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Winston*, 558 F.2d 105, 109 (C.A. 2, 1977).

Since the defendant himself admitted that, as part of his research, he had actually read the air piracy statute before he committed the crime (Tr. 3162) and he admitted that he knew that it was illegal to "jack a plane" (Tr. 2995), his own testimony established that he intended to hijack the aircraft knowing that what he was doing was illegal. Of course, if Mr. Busic believed that what he was doing was morally right, and that belief was the product of a mental disease, illness or defect, then he would possibly have a defense. *United States v. Freeman*, 357 F.2d 606, 662, n. 52 (1966); *People v. Schmidt*, 216 N.Y. 324, 340 (1915). But Dr. Diamond flatly says that Mr. Busic's state of mind at the time "was not caused by mental disease, illness or defect", nor was he operating under any "delusions", "hallucinations", or "other psychotic manifestations" (A. 344). Under these circumstances the fact that the defendant believed what he was doing was morally right is no defense. As Judge

³⁴ Indeed, a copy of it was found in his apartment (Gov. Ex 55).

Cardozo observed in *People v. Schmidt*, 216 N.Y. 324, 340 (1915):

It is not enough, to relieve from criminal liability, that the prisoner is morally depraved. Wharton, Criminal Law (11th Ed.) § 63. It is not enough that he has views of right and wrong that are at variance with those that find expression in the law. The variance must have its origin in some disease of the mind. * * * The anarchist is not at liberty to break the law because he reasons that all government is wrong. The devotee of a religious cult that enjoins polygamy or human sacrifice as a duty is not thereby relieved from responsibility before the law. * * * In such cases the belief, however false according to our own standards, is not the product of disease.

3. Dr. Diamond's testimony, in short, was simply irrelevant to the issue for which Mr. Busic now claims it was so critical. We, of course, do not dispute that most people who are fanatically devoted to nationalistic causes and who carry out illegal and violent acts to draw attention to their cause, are not "normal" as that term is used in vernacular. They are, no doubt "fanatical", "desperate" and "obsessive", and like most human beings, they act out of "psychological necessity". See *United States v. Bright*, 517 F.2d 584, 586 (C.A. 2, 1975). But the diminished capacity defense, to which F.R. Crim. P., Rule 12.2(b) refers, was not intended to permit a jury to turn a defendant loose merely because he has "the abnormal tendencies of a person capable of committing the offense". *United States v. Brawner*, 471 F.2d 969, 1001 (C.A.D.C., *en banc*, 1972).³⁵

³⁵ Nor does it permit expert testimony which contains "vague scientific reasons" and which is "not directed at negating a particular mental capacity so much as it [is] offered as a justification." *United States v. Bennett*, 539 F.2d 45, 53 (C.A. 10, 1976); *United States v. Peterson*, 509 F.2d 408, 414 (C.A.D.C. 1974).

Indeed, if upbringing, "social and cultural indoctrination", "total preoccupation" to a nationalistic cause, and a realistic fear of death or possible apprehension by one's adversary, is a defense to air piracy and acts of terrorism, simply because a psychiatrist can be found to say that "in his opinion" the defendant's state of mind is abnormal, then the United States will become a haven for terrorists of all kinds.³⁶

Judge Bartels properly excluded this so-called expert testimony which was not only irrelevant to any recognized defense, but which was not grounded "in scientific support to make us reach or, indeed, cross the frontier of admissibility". *United States v. Bright*, 557 F.2d 584, 586 (C.A. 2, 1975).

Point III

The District Court Did Not Err In Denying the Defendants Their Request to a Charge on a Lesser Included Offense.

The defendants Zvonko and Julienne Basic argue that the district court erroneously failed to charge the jury on the so-called lesser included offense of interference with a flight crew (49 U.S.C. § 1472(j)).

Section 1472(j) provides that: "[W]hoever, while aboard an aircraft within the special aircraft jurisdiction of the United States, assaults, intimidates, or threatens any flight crew member or flight attendant

³⁶ Only recently Andres Figuero Gordero, who led an armed attack on Congress in 1952, explained that he did so to draw "world attention" to the cause of Puerto Rican nationalism. N.Y. Times, October 17, 1977, Section D, p. 12. No doubt he too believed what he was doing was morally right.

(including any steward or stewardess) of such aircraft, so as to interfere with the performance by such member or attendant of his duties or lessen the ability of such member or attendant to perform his duties [shall be guilty of a felony]."

This argument, however, flounders on an erroneous construction of 49 U.S.C. § 1472(j), and the basic rule that a defendant is entitled to an instruction on a lesser included offense only "if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him on the greater." *Keeble v. United States*, 412 U.S. 205 (1973); *United States v. Harary*, 457 F.2d 471, 478 (C.A. 2, 1972).

A. The Defendant Zvonko Basic

The defendant Zvonko Basic alleges that he presented "sufficient evidence of mental distress for the jury to conclude that he was incapable of forming a 'wrongful intent'. With the intent element lacking, the jury nevertheless could have found Zvonko guilty of interference with the flight crew, yet not guilty of aircraft piracy" (Br. 49-50). This argument is frivolous.

The element of "wrongful intent" as we already have demonstrated, means that the defendant acted knowingly and wilfully. Mr. Basic's testimony on the stand established quite plainly that he hijacked the plane knowing that it was illegal to do so. (See, *supra*, p. 46). There was no rational basis for the jury to conclude otherwise, even if the offense of interfering with a flight crew does not require that the defendant do so "knowingly and wilfully."

Moreover, the defendant erroneously assumes that the offense of interfering with a flight crew does not require proof that the acts which have the effect of interfering

with the flight crew be performed with "wrongful intent", that is, knowingly and wilfully. The offense of interfering with a flight crew carries a maximum penalty of twenty years (49 U.S.C. § 1472(j)). We find it difficult to believe that someone could be convicted of such an offense merely by voluntarily doing an act, without any criminal intent, which has the effect of interfering with a flight crew. While we agree that the defendant need not have the special intent to interfere with the flight crew,³⁷ we believe that the acts which have that effect must be undertaken knowingly and wilfully. As Judge Blackmun said in *Holdridge v. United States*, 282 F.2d 302, 310 (C.A. 8, 1960), a deliberate violation of a known legal duty, is required in a criminal statute unless the "statute omits mention of intent... the penalty is relatively small... conviction does not gravely besmirch... the statutory crime is not one taken over from the common law, and . . . congressional purpose is supporting..."

In *United States v. Howard*, 506 F.2d 1131 (C.A. 2, 1974), this Court had occasion to construe a statute almost identical to 49 U.S.C. § 1472(j), which did not in *haec verba* require that a defendant act knowingly and wilfully. The statute there in issue was 18 U.S.C. Section 2113(a) which makes it an offense to take, "by force, violence, or by intimidation", from the person or presence of another, money belonging to a bank or other similar institution. In defining the elements of this offense, this Court said that the taking by force, violence or intimidation must be done "with wrongful intent, that is knowingly and wilfully" (560 F.2d at 1131). Accordingly, there was no rational basis for the jury to find that Zvonko Busic was not guilty of air piracy, but guilty of the offense of inter-

³⁷ This is all *United States v. Meeker*, 527 F.2d 12, 14 (C.A. 9, 1975), the only case cited by the defendant on this issue, holds.

ference with a flight crew. As Judge Bartels correctly observed, they require the same general criminal intent, i.e., that the defendant act knowingly and wilfully (App. 513-514).

B. The Defendant Julianne Basic

There was no rational basis for the jury to find Mrs. Basic guilty of interference with the flight crew and not guilty of air piracy. Mrs. Basic suggests that the jury could well have believed that she did not intend to participate in the hijacking of the plane, but that "her acts *after the seizure*, however well-intentioned, had the effect of intimidating a member of the aircraft's crew" (Br. 49). Moreover, her brief continues, "even had the jury found that Julie boarded the plane intending to help Zvonko throw leaflets from the windows—yet not intending to seize the aircraft—it could have concluded that her actions did not constitute participation in the seizure or conspiracy. On the evidence before the jury, therefore, Julie might have been acquitted of air piracy, yet convicted of the lesser offense."

Of course, this argument ignores the verdict of the jury. A jury which believed that Mrs. Basic had no intention to hijack the aircraft would not have convicted her of the more aggravated offense of air piracy resulting in death (under the instructions given by the trial judge), or of conspiracy to commit air piracy. Accordingly, even if the lesser included instruction on interference with a flight crew should have been given, the verdict returned by the jury shows that the error was harmless. Moreover, we do not understand by what rational basis the jury could have concluded that Mrs. Basic did not initially intend to participate in the hijacking, but that after her husband seized control of the aircraft, she interfered with the crew by assaults, threats or intimidation, and that she did so without any intention to aid him in the

hijacking. Her entire defense was that she did none of those acts and insisted her intent while on the plane was to help the passengers and flight crew. The jury could either credit her testimony and acquit her of every offense or convict her of everything.³⁸

Point IV

Julienne Busic Was Not Deprived of a Fair Trial by Egregious Judicial and Prosecutorial Behavior.

The next to the last point in the brief filed on behalf of the Busics, alleges that Julienne Busic was deprived of a fair trial by the conduct of the trial judge and the prosecutor. This last desperate effort to avoid the force of the overwhelming case against Mrs. Busic is likewise without merit.

A. The Conduct of Judge Bartels Was Fair and Unbiased.

The attack on Judge Bartels is in part general and in part specific. To begin with, we are referred to "[a] sampling of the trial court's improper remarks" (Br. 51, n.30), which is contained in the appendix to the brief. This is presumably the proof that he "[d]emeaned de-

³⁸ The defendants Matanic and Pesut, in the last footnote of their brief (p. 68 n. 60), claim that they too were entitled to a lesser included offense charge dealing with interference with the flight crew. Their claim is also frivolous. Their defense was that they first learned about the hijacking after Zvonko Busic seized control of the aircraft, and everything they did afterward was the result of coercion. There was no rational basis for a jury to acquit them of air piracy and convict them of interference with the flight crew, and certainly not a jury that found them guilty also of conspiracy to commit air piracy.

fense counsel". This general broad based assault is then followed by specific instances of alleged misconduct which are at least placed in some sort of context in their brief. We shall show that this argument is grossly unfair and is without any substantial merit.

1. Appendix C: The Alleged Sampling of the Trial Court's Remarks

Appendix C, which purports to contain "[r]epresentative prejudicial remarks by the district judge", contains thirty alleged improper comments, of which four were made out of the presence of the jury (although in two instances the defendant does not even bother to indicate it).³⁹ More significantly, of the twenty-six remaining examples, exactly four, in a 4500 page trial transcript, were directed to Julianne Busic's defense counsel in the presence of the jury. On this record they would have to have been pretty egregious to deprive Mrs. Busic of a fair trial. They were, however, each justified and basically innocuous.

a. The first alleged improper comment exemplifies one of the problems that Judge Bartels had to put up with, and that is the spectacle of two or three or even four lawyers shouting objections at the same time. One of many of such instances occurred at page 3492 of the transcript, an edited version of which is set out at pp. 4-5 of Appendix C. There, Judge Bartels told objecting counsel not to yell again. The following colloquy then ensued (not all of which is included in Appendix C):

³⁹ These are as follows:

Appendix C, pp. 1-2 (Tr. 1750)

" ,, pp. 3 (Tr. 1879)

" ,, pp. 6-7 (Tr. 3783)

" ,, pp. 13-17 (Tr. 4496-4500)

The defendant fails to indicate that the first two examples are outside the presence of the jury.

"Mr. Rudolf [One of Mrs. Basic's lawyers]: Your Honor, there were three people objecting at the same time.

Mr. Rochman [Mr. Pesut's lawyer]: We had a little chorus, Your Honor, not a Greek chorus, but a chorus.

Mr. Rudolf: We will try not to do it."⁴⁰

b. The second of the four "representative prejudicial remarks" affecting Mrs. Basic, epitomizes the desperation which this argument reflects. It is set forth at page 5 of Appendix C and reads as follows (Tr. 3496):

"Mr. Rudolf: Your Honor, my next witness will be a fairly lengthy witness and since it is five after five on Thursday afternoon that we break until Monday morning?

The Court: Every now and then you do make some good suggestions." (Tr. 3496).

c. The third alleged example of an improper comment again reflects the problems that a trial judge had in a multi-defendant trial. This came about in a situation in which counsel were objecting to one another's objections, and the trial judge was simply mocking both the prosecutor and defense lawyer. This colloquy, which appears on page 5 of Appendix C (again not in full), reads as follows (Tr. 3553-3554):

"Q. Mrs. Basic—

Mr. Schlam [the prosecutor]: I will object to the facial expression, your Honor.

Q. Mrs. Basic—

⁴⁰ Of course, not only were the defendants engaged in a disruptive "chorus", but the objection was without merit and was overruled.

The Court: Well, I don't want to make any comment about that.

Mr. Asen [One of Mrs. Basic's lawyers]: I object to Mr. Schlam's objection to the facial expression. I have my eyes—

The Court: I object to your objection to Mr. Schlam's objection to Mr. Rudolph's objection.

Mr. Asen: Fine, your Honor.

The Court: So we can go on ad infinitum. Please sit down and forget this nonsense and go again with the examination of the witness.

Mr. Rudolph [Another one of Mrs. Basic's lawyers]: Thank you, your Honor." (Tr. 3554).

d. The last and final allegedly representative prejudicial remark by the trial judge reflects another of the problems a trial judge has in a long, multi-defendant trial, and that is an effort to avoid repetitive questioning. Judge Bartels had been particularly liberal in allowing page after page of repetitive self-serving testimony of marginal relevance. On page 3631 of the transcript (referred to on page 5 of Appendix C), after Mrs. Basic had been asked what specifically she told her husband from the tower, *and after she answered the question* (Tr. 3629-3630), her lawyer *again* asked her to relate the substance of the conversation. Judge Bartels interjected and said:

"The Court: I thought we just had it. I thought we just had the substance.

Mr. Rudolf: I think we had a part of the substance, your Honor.

The Court: No, you stick to the facts. I don't want any great declaration of those facts that are not relevant.

Mr. Rudolf: I am merely trying to bring out the substance.

The Court: Trying to tell you what the rules of evidence are. And you try to comply.

Mr. Rudolf: Absolutely." (Tr. 3631).

The comment we believe was a perfectly proper effort on the part of the trial judge to move the trial along and not waste time on evidence of limited relevance. Moreover, had Mrs. Basic's lawyer simply put a more specific question, as in fact he did afterwards (Tr. 3631), instead of arguing with the judge, the judge's admonition to him would never even have occurred.

This, then, is the sum and substance of the allegedly improper comments Judge Bartels made to Mrs. Basic's lawyer in front of the jury during this entire trial.⁴¹ The suggestion that these comments in the slightest degree deprived Mrs. Basic of a fair trial is frivolous, particularly in light of the overwhelming evidence of her guilt. The defendant Zvonko Basic, of course, does not even allege that he was deprived of a fair trial by the two innocuous comments, some 3000 pages apart, cited in Appendix C. While Mrs. Basic cites some twenty other examples of the same ilk involving the defendants Matanic and Pesut, we shall deal with their claim separately. We do not, however, accept the proposition that, if Matanic and Pesut were prejudiced, there was a spill-over effect on Mrs. Basic. Not only was her defense, if you can call

⁴¹ There are two other examples cited in Appendix C, p. 3 (Tr. 1879), and pp. 6-7 (Tr. 3283), of alleged disparaging remarks to Mrs. Basic's counsel. These were out of the presence of the jury and were perfectly proper in context. Since they could not possibly have prejudiced Mrs. Basic's right to a fair trial, and since this brief is already long, we shall not say anything more about them.

it that, substantially different from Matanic and Pesut, but they were acquitted of air piracy resulting in death, the most serious offense, while she was convicted of that offense. This hardly shows that there was any "natural tendency [by the jury] to lump together all the members of the defense" (Basic Br. 53 n. 32).

2. The Alleged Misconduct Discussed in the Text of the Brief

The text of Mrs. Basic's brief at pp. 54-56, contains "[a] few examples [that] tell the story" of how Judge Bartels, "by his cross-examination, interruptions, and unnecessary remarks...unfairly destroyed the credibility of certain parts of [Mrs. Basic's] testimony and reduced the impact of the others" (Br. 54). This claim is without merit. Judge Bartels' error, if any, was letting in page after page of irrelevant and self-serving testimony. We proceed to establish just that in discussing the five examples of the alleged misconduct cited in the text of Mrs. Basic's brief.

a. Mrs. Basic's attorney alleges that in his summation, the prosecutor argued "that Julie's role in bringing the hijacking to a close evidenced her complicity in the hijacking itself (Tr. 5337)" and that this "powerful argument" was possible because as "Julie began to discuss her role in bringing the hijacking to a close, the judge interrupted and turned the direct examination into a scathing cross-examination by the court (Tr. 3624-28) (Br. 54)". This "example" is unsupported by the record.

The prosecutor said in his summation that Mrs. Basic was the one who was asked to leave the plane and make the necessary calls because she "was the most trusted person for the most sensitive task" (Tr. 5337). Mrs. Basic, in response to questions by Judge Bartels, had testified as follows:

The Court: There did come a time when you were asked to leave the plane, make contact with somebody?

The Witness: Actually, I asked my husband because I was hoping he would let—

The Court: No hoping. You asked your husband about what?

The Witness: I asked him if it would be possible for me since he trusted me to go off and to call anybody he might trust to give him the information he needed back here in New York.

The Court: What did he say?

* * * * *

The Witness: What did he say? He finally agreed it would be a good idea. He gave me the names and addresses of three people he wanted me to ask when I left the plane." (Tr. 3625-3626).

The questions Judge Bartels put were perfectly proper; he intervened only to try to move the trial along with direct and pertinent questions, and his refusal to permit Mrs. Basic to testify to what she was "hoping", as distinguished from what she did, was perfectly proper. Indeed, when she finally gave a direct answer, she said that it was her idea to leave and make the call. And, in his summation her attorney used this response to answer the allegedly "powerful" argument in the prosecutor's summation (Tr. 5704).

b. The second example of alleged misconduct is that just as Mrs. Basic's "counsel began to elicit information about conversations Julie had with passengers on the plane, the judge interrupted with four pages of irrelevant questions (T. 3608-11, see also T. 3611-14). The thrust of counsel's presentation was destroyed" (Br. 55). This claim is again simply inaccurate.

We do not believe the questions were "irrelevant", and, indeed, some were even helpful to Mrs. Basic. But her counsel quite readily picked up again the "thrust" of his presentation about Mrs. Basic's conversations with passengers (Tr. 3614). And the colloquy which follows shows how far Judge Bartels bent over to permit irrelevant and self-serving statements. Mrs. Basic explained that the passengers "wanted to know what the conditions were and I explained what he told me was the case" (Tr. 3614). Then over an objection by the prosecutor, Judge Bartels permitted Mrs. Basic to testify (Tr. 3614):

"I felt very sorry for what the passengers were going through. I wanted to try to get as many messages as I could from my husband so I could go back and tell them what was going on and they were very uncomfortable and they were very ill at ease, I think, at that point because a lot of other things had happened and I think I had disagreement with my husband up in front about the condition of things and I was trying to talk him into getting things done faster so they could get off the plane, something like that. I really can't remember it exactly."

c. Next, according to Mrs. Basic, when she was about to describe her feelings about her husband's decision to leave New York for Chicago, the trial judge summarily cut her off (Tr. 3564)." (Br. 56). This claim too is inaccurate.

The defendant admitted that she knew her husband intended to hijack Flight 355 and she nevertheless went with him despite that knowledge, because she wasn't strong enough to stay behind. The colloquy which Judge Bartels properly interrupted, in fact, probably prevented an incriminating response (Tr. 3564):

"Q. * * * Did you have any other conversation with your husband?

A. I was dissatisfied with that first explanation he gave me of why he was going to Chicago and I continued to ask him questions about it. I don't know if it was right afterwards, it might have been later the same day, but I just didn't want, *I had a feeling that something was wrong—*

The Court: No."

Of course, her feeling "that something was wrong"—would ultimately lead her to admit her knowledge that what was wrong was that he planned to hijack the plane. When, however, Mrs. Busic was questioned about her feelings upon learning this, Judge Bartels improperly let everything, including the kitchen sink, come in:

"A. I said, please think about it. Don't—I was worried about my family. I didn't know what would happen—

Mr. Schlam: I'm going to object to this.

The Court: I'll permit it.

A. I was thinking mostly about my mother, and I said how my mother is going to react." (Tr. 3570)

* * *

"Q. Describe to the ladies and gentlemen of the jury what your reaction was, what you said to him and how you felt about what he told you?

Mr. Schlam: Objection.

The Court: What date is this?

Mr. Rudolf: Approximately September 8, which is no more than two days prior to this incident.

The Court: I'll permit it. Proceed.

A. Well, I think I ended by talking about—asking him what effect this would have on my family because I was—I was really shocked and disturbed about the whole thing and I didn't expect to have heard it from him. He said 'at least your parents are in America, not in Eastern Europe and anything could happen to my parents. They are in a lot worse situation than your parents.'

He said he was trying to—he's trying to fight against what he felt were examples of a government terrorizing people and not being punished for it." (Tr. 3586-3587).

d. Mrs. Basic's next complaint is that just as she began to indicate her thoughts at the *moment* the hijacking occurred, the government objected and the Court responded: "no, no. Strike that out. Just say what happened. (Tr. 3599)". (Br. 56). This argument too is inaccurate.

Judge Bartels permitted Mrs. Basic to answer the question about what her "reaction" was at the *moment* the hijacking occurred. And she gave this revealing answer (Tr. 3598):

"I saw my husband in the cockpit with some kind of contraption around his neck with wires and stuff sticking out of it. *It's a lot different than talking about it—having it actually happening.*"

The objection Judge Bartels sustained, at Tr. 3599, was when Mrs. Basic began talking about her feelings when the other passengers realized she was a hijacker and started *looking* at me, and I felt very, very uncomfortable * * *. Since the question which this answered began with the words "What happened * * *" (Tr. 3598), and since Mrs. Basic's statement of her "feelings" was irrelevant and unresponsive, Judge Bartels properly

sustained the objection and told her (Tr. 3599): "Just say what happened."

e. Judge Bartels' final act of alleged misconduct was to derogate "Julie's testimony on this central issue", i.e., "her concern for the welfare of the passengers" (Br. 56). We are frankly at a loss to understand how Mrs. Busic's self-serving statements about her concern for the passengers was a "central issue" in this case. We know of no case that holds that hijackers who feel sorry for their victims should be set free. Nevertheless Judge Bartels let Mrs. Busic testify over objection (Tr. 3614):

"I felt very sorry for what the passengers were going through."

Judge Bartels also said she should explain what she saw instead of just saying what she felt (Tr. 3605). Mrs. Busic took the hint and, in response to a helpful question from Judge Bartels (Tr. 3607), talked about things that she did for the passengers, and what she said to them (Tr. 3606 3607): "I was bringing passengers blankets or pillows or stuff like that or getting them anything from their luggage that they wanted up in front to make themselves more comfortable * * *". (Tr. 3607).

Moreover, Judge Bartels let in extrinsic evidence from passengers on that very issue. One passenger was permitted to testify that Julie showed "what I interpreted as concern and compassion for the passengers" (Tr. 3459). Another was permitted to testify that she was pleasant, she did her job, "she was compassionate with people" (Tr. 1861).

In summary, the suggestion that Judge Bartels improperly curtailed Mrs. Busic's ability to put in self-serving statements and evidence of the most marginal relevance, is a malicious libel of a desperate defendant. If he did anything, he prejudiced the right to the United States to a fair trial by allowing evidence in to the ex-

tent that he did. Moreover, lest there be any suggestion in the mind of the jury, he gave the strong cautionary instructions about his remarks and admonition to counsel (A. 574-576); instructions which on this record clearly cured any impression that he was biased. *United States v. Berardelli*, No. 77-1132, F.2d , Slip op. p. 6272 (C.A. 2, Oct. 15, 1977).

B. Julianne Busic Was Not Denied A Fair Trial by the Conduct of the Prosecutor.

The Assistant United States Attorney in this multi-defendant case that took over five weeks to try gave a summation that ran for about one-hundred and sixty pages. Although page after page of improper comments are now alleged by Mrs. Busic, the summation was not interrupted once by an objection. This was not because there was agreement by "all sides" that there would be no objections during summations, as the Pesut-Matanic brief (p. 42) suggests (Tr. 5252-5254),⁴² but because they chose to sit by and say nothing in the hope that the prosecutor would say something that would taint the conviction that was inevitable. Moreover, even now, of the four defendants, only the defendant Julianne Busic, as part of a point containing an omnibus assault on the judge and the prosecutor, claims that anything was said that warrants reversal.

Mrs. Busic's argument here, like her baseless attack on Judge Bartels is divided into two parts. The first part relates to one statement by the prosecutor with respect to a statement in Zvonko Busic's post-arrest confession. The

⁴² No such agreement was made. The only request that was made was the attempt to avoid the "chorus" of disruptive objections, and that one objection suffice for all (Tr. 5252). Only the attorney for Mr. Busic said he would not interrupt unless something is said that "goes beyond the beyond" (Tr. 5253).

second contains a collection of comments, again accompanied by an appendix, which are now said to be improper, but to most of which no objection was ever taken. We deal with each of these claims separately.

1. The Comment Relating to Zvonko Basic's Post-Arrest Statement

Zonko Basic, as we have shown, had no defense. The testimony he gave was a full confession; its only purpose was to try to extricate the other defendants. Moreover, even his post-arrest confession was largely an effort to take most of the blame for the hijacking, and all of the blame for the death of Officer Murray. Indeed, because Mr. Basic's post-arrest confession went to such great lengths to exculpate the defendants, particularly regarding their awareness of the live bomb, it was not offered in the case-in-chief; and so much of its contents were offered by the defendants (Tr. 4588, 4591-4592, 4593-4594, 4598-4601), that Judge Bartels inquired as to whether the entire statement had been offered in evidence (Tr. 4598).⁴³ "No", they responded, (Tr. 4598); "We read portions of it to the jury, which is permissible."

When, however, Mr. Basic testified on direct examination that he stored the dynamite he purchased from the "Mafia man" in the cellar of his apartment building, and that he never told Julianne about it (Tr. 2895), he opened himself up to a cross-examination which forced him to admit that the package containing the dynamite was

⁴³ The statement probably could have been admitted in the direct case against Julianne—to the limited extent it inculpated her—as an admission against penal interest, F.R. Evidence, Rule 804(b)(3). *United States v. White*, 553 F.2d 310 (C.A. 2, 1977). Since Mr. Basic was "unavailable" in the direct case, because of the privilege against self-incrimination, the "statement against interest" exception to the hearsay rule would have applied. F.R. Evidence, Rule 804(a)(1).

stored, for three months, in the small one room apartment he shared with Julianne. Mr. Basic, however, again denied that he ever discussed the dynamite with her (Tr. 2895, 3146). In order to impeach Mr. Basic's testimony that Julianne had never seen the package of dynamite in the apartment, Mr. Basic was asked about a post-arrest statement he made to the F.B.I., that although Mrs. Basic did *not* know what was in the package, he had told her that it was dangerous and not to touch it (Tr. 4559).⁴⁴

Mrs. Basic argues that the prosecution case "relied heavily on an alleged statement by Zvonko that he had told Julie that the package stored in their closet was 'dangerous'" (Br. 57-58) even though Zvonko denied having made such a statement, and that the prosecutor improperly relied in his summation on Zvonko's statement to prove that she knew there was a dangerous package in the apartment". This argument, like so many others, is both exaggerated and misleading.

Mrs. Basic's fingerprints were found on the demand note in the locker in Grand Central Station, along with the live bomb. The demand note said that "a second-timed explosive device which is likewise in a highly busy location shall be activated" unless two accompanying propaganda texts, on which Mrs. Basic's fingerprints were also found, were published, and that, through a pre-arranged code word the hijackers on board the plane would learn if the demands were met (see, *supra*, pp. 17-19). Under these circumstances, and all of the other evidence implicating Julianne Basic in the air piracy, the post-arrest statement of Zvonko Basic that Julianne Basic was *not* aware he was storing dynamite in their small one room apartment,

⁴⁴ Mr Basic claimed that what he told the F.B.I. was that he did not tell Mrs. Basic that the package was dangerous, but that if Mrs. Basic had found the package she would be smart enough to realize that it was dangerous (Tr. 3148).

but only that there was a dangerous package, was hardly the centerpiece of the case against her. Indeed, the thrust of the excerpt from the summation cited in Mrs. Busic's brief (Br. 58-59), was that Zvonko Busic was lying to the F.B.I. when he said she was not aware that dynamite was stored in the apartment, but only that some dangerous object was stored there.

Moreover, Mrs. Busic's brief also ignores the fact that the prosecutor was entitled to make use of Zvonko Busic's post-arrest statement to impeach the credibility of his trial testimony. So that the prosecutor was clearly entitled to say to the jury: "How can you believe Mr. Busic when he says he did not tell his wife that there was a dangerous object in the apartment, when he told the F.B.I. that he did tell her that." See *United States v. Nuccio*, 373 F.2d 168, 172-173 (C.A. 2, 1967), *certiorari denied*, 393 U.S. 930. Indeed, but for the comment cited at page 58 of the defendant's brief, that was essentially the point he argued (See, e.g., Tr. 5377-5377a).

Surely on the basis of the record of Mrs. Busic's guilt here, and particularly of her knowledge of the live bomb, combined with the strong corrective instruction given by Judge Bartels (Tr. 5773) the somewhat different language he did use is plainly harmless.⁴⁵

⁴⁵ Since Mr. Busic testified, any error in referring to his earlier confession in relation to Mrs. Busic, was not of constitutional magnitude; (*Nelson v. O'Neil*, 402 U.S. 622 (1971); *California v. Green*, 399 U.S. 149, 168-169 (1970)), and is not governed by the stringent rules for overcoming such error. *United States v. Valle-Valdez*, 554 F.2d 911, 916 (C.A. 9, 1977). Moreover, the violation of the hearsay rule which it may involve was of the most technical kind. Because the statement of Mr. Busic was basically self-inculcating, and sought to exculpate Mrs. Busic, and since he was available for cross-examination, none of the principal considerations underlying the hearsay rule were violated here. 5 Wigmore, *Evidence*, Third Ed., 1362, 1395. *United States v. Torres*, 503 F.2d 1120, 1126 (C.A. 2, 1974), cited as a case in

[Footnote continued on following page]

2. The Remaining Comments of the Prosecutor Were Fair and Proper in Context and Did Not Prejudice the Defendant Julianne Basic.

The comments of the Assistant United States Attorney to which Mrs. Basic now voices such strenuous and heated objection, but as to many of which she took no objection at trial are really divided into two parts—the first, relate to the comments of the Assistant United States Attorney regarding Zvonko Basic's efforts to exculpate her, and the second refers to comments on her own testimony. We believe that these comments taken in context were with perhaps one exception entirely fair and accurate.

a. The Comments on the Testimony of Zvonko Basic

The record plainly supports the opening comment of the prosecutor that Zvonko Basic "admitted before you under oath on the witness stand his guilt 100 percent",⁴⁶ that he was testifying "to exculpate his co-defendants", and that in the face of the evidence he was going to have to come up "with something as plausible as he can" (Br. 60). Moreover, to prove his point that Zvonko would strain to protect his confederates, the Assistant United States Attorney cited various examples of his testimony at trial. So, for example, to support the argument that he was trying to help Julianne with his testimony, an

which a conviction was reversed because the summation implied that "impeachment testimony was affirmative evidence" (Br. 59), does not so hold. There three errors, of which this was only one, were cumulatively held to be prejudicial on the facts of that case.

⁴⁶ The Assistant United States Attorney was careful to limit that comment to Count Two—the simple air piracy charge (Tr. 5341).

allegedly improper reference cited at page 61 of Mrs. Busic's brief, the prosecutor called the attention of the jury to Mr. Busic's testimony on direct examination that the dynamite he purchased was stored in the cellar of his apartment house, when he would ultimately admit on cross-examination that he stored it in his apartment for three months (Tr. 5377).

Moreover, to prove that Mr. Busic was covering up for others, by accepting full blame himself, the Assistant United States Attorney cited three examples: (1) the defendant's refusal, despite a clear order of the district court, to reveal the names of the persons he claimed helped him prepare one of the propaganda texts, which proved that he will not "under any circumstances" reveal who participated in this operation (Tr. 5371); (2) the fact that despite all the evidence that the hijackers were waiting for a code word all those many hours on the ground in Paris, Mr. Busic gave a false explanation for his claim that there was no code word because if he gave a true explanation, he would have had to come up with a credible explanation linking others (Tr. 5363-66); and (3) Mr. Busic's preposterous story about the purchase of the dynamite from a "Mafia man" at a bar who asked him if he was a revolutionary interested in purchasing "illegal stuff". Not knowing or caring whether what he was buying was sausage or dynamite, Busic said he paid the "Mafia man" \$200.00 in cash (See, *supra*, pp. 15-16). In commenting on this particular effort to conceal the identities of the source of the dynamite, the prosecutor said (Tr. 5368):

"I suggest to you that you couldn't tell that story to a three year old and have that little baby believe it. Why did Mr. Busic tell that non-sensical story?"

We submit that all of his comments were entirely fair and proper and Mrs. Busic's counsel not once objected

to any of them. Indeed, although Zvonko Basic's testimony was practically per se perjurious, and was an affront to the dignity of the district court, the Assistant United States Attorney never once, much less "again and again and again" called him or Mrs. Basic a liar, as her brief alleges (Br. 60).⁴⁷

b. The Comments on the Testimony of Mrs. Basic

The independent evidence of Mrs. Basic's involvement in the offense, as we have shown, is overwhelming. (See, *supra*, pp. 21, 33, 42). Moreover, her own testimony was that she knew when she boarded the plane, that her husband intended to hijack it (Tr. 3634), she knew her ticket was in a false name, she did the research that resulted in the selection of a Boeing 727 so that leaflets could be dropped (Tr. 3015), she did what her husband wanted her to do while she was on the plane, and that she even admitted telling one of the passengers that the hijackers had brought explosives on board the plane in their handbags (Tr. 3680). Of course, she knew the explosives were false (Tr. 3678). The best that her able counsel can now say by way of a defense was that "she never made a conscious decision to accompany Zvonko on the flight" (Br. 14) and that "[o]nce on board she never became part of the hijacking" (Br. 15).⁴⁸

⁴⁷ In a footnote (Br. 61, n. 35), the defendant also characterizes as improper the statement of the prosecutor that "as a matter of law", Zvonko "came very, very close, if he did not implicate Julie in the hijacking". This, of course, is an accurate characterization of his testimony in the context in which it was made (Tr. 5371). Nevertheless, Judge Bartels offered to give a corrective instruction (Tr. 5463), but the defendant apparently never thought to remind him to do it, although it was the only comment on Mr. Basic's testimony to which she did object.

⁴⁸ This type of "defense" surely justified the comment in summation, about which Mrs. Basic now complains (Br. p. 62, n. 36):

"Now, with respect to Mrs. Basic. Mrs. Basic, I suggest to you, testified but did not offer a defense. She simply

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One can imagine that with a defense like that, and the hard evidence the United States had, Mrs. Busic was subject to brutal cross-examination, and gave answers which would in context support a summation that would characterize them as "nonsensical", "ridiculous" and "cute" and "manipulative" (Br. 62) and it is not surprising that no objection was ever taken to any of these remarks. Similarly, the prosecutor was able to collect page after page of testimony from the record (Tr. 5382-5392), which supported his claim now said to be improper (Br. 62), that Mrs. Busic remembered what she wanted to remember, and forgot "things that aren't going to help her."

The prosecutor's comments were, however, almost always directed to the evidence and the answers she gave, and no personal epithets were leveled at her. Nor was she ever called a "liar", although the prosecutor's arguments quite properly inferred that she was not telling the truth. Indeed, even the comment that is cited as the most egregious (Br. 62), which properly characterized her defense as "nonsensical", which it was, and "unintelligent, [and] insulting," which it was, although it might have been more charitably characterized, and in response to which Judge Bartels gave a curative instruction (Tr. 5481), was understandable in light of the utterly preposterous story she and her husband told and the long and protracted trial which culminated with this summation.

As Chief Judge Kaufman observed in *United States v. White*, 486 F.2d 204, 206-208 (C.A. 2, 1976), which for some strange reason Mrs. Busic cites, certain words

did not offer a defense. No matter how much she tried to minimize, to hedge, to bob, to weave, the fact of the matter is, the undisputed fact, even by her own reluctant admission she knew before she got on the plane was going to be hijacked, no question about that * * *¹¹ (Tr. 5378). The summation continued with a full statement of the evidence against her (Tr. 5378-5379).

or comments (in that case characterizing the defendant twice as a liar, and repeatedly saying that the defense was fabricated), that arouse concern in a short trial of two days duration, may not arouse the same concern "if they were uttered at the conclusions of a long and hotly contested trial." Moreover, although the words of the prosecutor in *United States v. White* were found to be "ill-conceived," the conviction was affirmed because the "[p]roof of guilt was clear and convincing" and the "verdict was insured by the defendant's words and not the prosecutor's." This is surely true here.⁴⁹

POINT V

The Death of Officer Brian Murray Resulted from the Commission of the Offense of Air Piracy.

The defendants Petar Matanic and Frane Pesut, were the death of Officer Brian Murray simply resulted from an act that was "somehow related in time with a hijacking" and for that reason alone it "borders on arrogance" to suggest that his death can be converted "into a federal hijacking concern" (Br. 68). According to them, Congress has no interest in deadly acts of terrorism which take place outside the aircraft even if they are intended to aid and abet its unlawful seizure.

⁴⁹ There is one last, malicious suggestion hidden in a footnote in Mrs. Basic's brief. And that is the alleged misrepresentations of the record by the prosecutor (Br. 62, n. 37). We believe that it was a fair argument for him to suggest that Julianne's concern for the passengers was based on her concern that good morale was essential to the success of the hijacking. Indeed, Mr. Basic said that one of his concerns in planning the hijacking was that passengers would panic (Tr. 2989). Moreover, there was testimony that Mrs. Basic was the one most trusted by her husband (Tr. 1693, 3625), and she admitted she introduced the hijackers to the crew (Tr. 3720).

Judge Bartels answered this silly argument in a long and thorough opinion upon which we mainly rely (A. 303-317). We cannot, however, sit back and accept the arrogance of the suggestion that conviction of Zvonko and Julianne Busic for air piracy resulting in the death of Officer Murray came about simply because his death was "somehow related in time with a hijacking."

The bomb that was planted in Grand Central Station and that exploded in Officer Murray's face, was "very important" to the success of the hijacking, as Zvonko Busic conceded (Tr. 3154). The live bomb lent credibility to the claim of the hijackers that the explosives, which they smuggled aboard the plane through "an ingeniously devised strategem" were real.⁵⁰ *United States v. Busic*, 549 F.2d 252, 257 (C.A. 2, 1977). Moreover, Officer Murray made an effort to defuse the bomb instead of detonating it without risk to anyone, in order to find out the nature of the explosives that were on the plane (See, *supra*, pp. 18-20).

The defendants acknowledge that Congress clearly has the power to bring the death that resulted from the explosion that killed Officer Murray within the scope of Section 1472(i), and that there is nothing in the language which precludes its application here.⁵¹ Moreover,

⁵⁰ The original demand note handed to Captain Carey said: "We have left the same type of bomb [we have on the plane] in a locker across from the Commodore Hotel on 42nd Street" (Tr. 1513).

⁵¹ There is in fact language in the antihijacking law which plainly suggests that Congress affirmatively intended to include deaths which occurred outside the aircraft. One of the "aggravating" factors which would justify the imposition of the death penalty—where a death results from a hijacking—is that "in the commission or attempted commission of the offense, the defendant knowingly created a grave risk of death to another person *"in addition to the victim of the offense."* 49 U.S.C. § 1473(c)(7)

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as Judge Bartels aptly observed (A. 313), recent Congressional revisions of the air piracy statute have emphasized the overwhelming federal interest in discouraging air piracy. They are "indicative of Congress' concern to afford a rational scope for prosecution of suspected hijackers with a minimum of technical barriers." (*United States v. Basic*, 549 F.2d at 256, n. 7 (C.A. 2, 1977)).

We know of no rational basis why Congress would seek to exclude from coverage of the air piracy statute acts of terrorism on the ground which are intended to aid and abet the hijacking of a plane. Nor do we know of any rational basis why one series of acts designed to achieve a single illegal act should be splintered into several trials in various state and federal jurisdictions. See *United States v. Leonard*, 500 F.2d 673 (C.A. 5, 1974).

PART 2

The Arguments of the Defendants Matanic and Pesut are Without Merit.

POINT 1

Judge Bartels Presided Over The Trial in an Eminently Fair and Impartial Manner.

The defendants Petar Matanic and Frane Pesut, were acquitted of the most serious offense in the indictment, air piracy resulting in death, because Judge Bartels refused to follow settled law in charging the jury and

(B) (iii). Since the victims of the offense of air piracy are the people on board the plane, Congress must have had in mind others on the ground whose lives were endangered, such as an employee on the ground who is shot as the hijackers attempt to get to the plane.

exercised his discretion to give a devastating charge on the dangers of eyewitness identification (See, *supra*, pp. 28-31). Although they are unable to point to a single error of law in a 6,000 page record, they have the temerity to suggest "[i]n plain and simple language", that Judge Bartels' "conduct poisoned the trial and prevented it from being fair" and that "[t]he judge and the government became a team" (Br. 53).

The argument part of the brief of Matanic and Pesut in support of these scurrilous allegations is sparse, to say the least, and most of the facts predicate for it is buried throughout the text and footnotes of what is supposed to be a statement of facts. Nevertheless, the statement of facts does have several distinct parts which are plainly intended to support this argument. We shall examine each of those parts carefully—as we did with Mrs. Basic's claim—and put the lie to this baseless claim. Moreover, if on occasion Judge Bartels used harsh language—most of the time out of the presence of the jury—it was because he was provoked by the misconduct of counsel.

A. Judge Bartels Did Not Preclude The Defendants From Putting In Evidence To Support Their Theory of the Defense.

The first part of the statement of facts, which contains a sustained attack on the conduct of the trial judge, falls under the heading of "the theory of the defense" (Br. p. 5). The "theory" of Pesut and Matanic was that they boarded Flight 355 with one-way tickets in false names, and were sitting in different parts of the aircraft, because they were going on a secret mission to deliver leaflets to Chicago, and they did not learn of the hijacking until Basic seized control of the plane and "pressed them into service on the threat that if they did

not they would die along with the rest of the passengers" (Br. 6).

1. According to the defendants, "it became crucial at trial to show that their conduct throughout the flight was consistently nonthreatening, and in Matanic's case, wholly solicitous of the passengers." Judge Bartels, say the defendants, "never permitted the jury to fairly consider that Matanic's and Pesut's conduct was wholly consistent with *their* defense" (Br. 6-7).

This claim, of course, does not affect Pesut, who concededly intimidated the passengers by sitting with a pot bomb between his legs. Indeed, the only two passengers who had anything else to say about him told about the incident, when the French jet approached Flight 355, and Pesut went running through the aisles with the bomb in his hand shouting: "Close the shades." (See, *supra*, p. 10; Tr. 4781, 1804). Judge Bartels barely implied that he agreed with an objection, which he overruled, to the silly question whether Vlasic or Matanic was the "most stable" (Tr. 1741), and he finally did sustain an objection to the question whether Matanic was the "most compassionate of the male defendants" (Tr. 1892-93),⁵² which are cited as examples of his bias (Br. 7, n. 9). He made it clear, however, that he would permit testimony regarding how Matanic acted (Tr. 3274): "The point is, how did he act, what was his behavior, was he rough and threatening, or seemed to be kind, courteous and considerate. I will permit that." (Tr. 3274). Judge Bartels thus permitted testimony, of which following is illustrative (Tr. 3275):

"THE WITNESS: No, I didn't see him ever to be rough or cruel. He was—

THE COURT: Was he indifferent?

⁵² This was hardly a great honor considering the conduct of the other male defendants.

THE WITNESS: He was kind and interested in—

Q. The welfare of the passengers?

A. Well, on the basic flow of the—well, it's more an impression than actually seeing him do things specifically. It's just an impression.

THE COURT: By looking him over?

THE WITNESS: An impression of him as a person that wasn't cruel or rough.

Q. Did you know that he removed a sick passenger from the plane while it was in Paris?

A. Yes.

Similarly, he let other passengers testify that "Mr. Matanic was very concerned about that—the health of that sick passenger" (Tr. 1886, 4785), and that they never heard him "threaten any of the passengers or members of the crew" (Tr. 1938). The manner in which Judge Bartels exercised his discretion on this issue was, in short, entirely proper.⁵³

2. The second part of the argument that the defense theory was improperly curtailed is that the district court "never fairly permitted Matanic and Pesut the opportunity to demonstrate that the relationship Basic had de-

⁵³ Unable to make any showing that Judge Bartels improperly excluded relevant testimony affecting him, Matanic cites a colloquy with Mrs. Basic's counsel, outside the presence of the jury, in which Judge Bartels explained that evidence of threats, violence and intimidation were part of the proof of the offense of air piracy 49 U.S.C. § 1472(i); but being nice to the passengers while her accomplices intimidated them, was, at best, of marginal relevance (Matanic—Pesut Brief p. 7, n. 9). Nevertheless, as we have already shown, he bent over backwards to allow evidence of Mrs. Basic's concern and compassion (See, *supra*, p. 64).

veloped with them was one in which Basic, by reason of his position as a leader in the Croatian liberation movement, the surveillance of him by Yugoslavian agents, as well as attacks on his person, was absolutely conducive to the foolish trust that they placed in him (Tr. 2183-88)" (Br. 7-8).

We do not quite know what the defendant is referring to when he says Judge Bartels did not permit such proof. Judge Bartels let in page after page of testimony, mostly over the objection of the prosecutor, regarding Basic's devotion to the cause of Croatian independence, the surveillance of him by Yugoslavian agents, as well as alleged attacks on his person. The statement of facts in Zvonko's brief pp. 9-11, based largely on his testimony, reflects all of this.⁵⁴ Moreover, Judge Bartels also permitted testimony from both Zvonko Basic, and Matanic and Pesut regarding conversations he had with them. Basic testified that he first met Matanic in a bar in March, 1976, and he overheard a discussion in which he realized that Matanic "was connected with Croatian independence"—it seems that Petar was telling "this other Croatian fellow how his father was assassinated * * *" (Tr. 2915). They then had a discussion about their "political beliefs". Basic would also see Matanic at the Croatian Center and at the Croatian Church every Sunday (Tr. 2916). Basic then had another three hour discussion about Croatian politics and assassinations with Matanic in April, 1976 (Tr. 2917). Moreover, Basic invited Matanic to attend a Croatian political meeting (Tr. 2918), and then in June, he had another meeting at which he told him (Tr. 2920-2921):

⁵⁴ We, of course, challenge the credibility of most of his self-serving testimony. Indeed, despite the alleged threats over the telephone, and his fear for his life, Zvonko and Julienne Basic lived openly in New York and had their telephone listed in the telephone book (Tr. 3006-3007).

I did tell him, however, that I would need him to go with me and carry some leaflets in order to bring them to Chicago and we were going to meet there some people from Croatia and Croatians from Europe and they would proceed and carry on these leaflets. * * * *and that was the purpose why he should not talk to anyone because this meeting was in very large secrecy, very great secrecy.* (Tr. 2920-2921)."

* * * * *

The Court: And he didn't ask you [who was going to attend the meeting]?

* * * * *

THE WITNESS: I answered him that I was not able to tell him and he is a beginner in this Croatian activities. . . . *And if he continued doing anything, he will find out that everything must be kept in secret because on—in order to survive, and in order to keep your head on your shoulder.*" (Tr. 2922).

Moreover, when Matanic allegedly asked about the false ticket, Basic "[e]xplained to [him] I don't have to worry about it, he's afraid the Yugoslav Secret Service agents would follow him and we had an important meeting and he did travel before with false name and not to worry about that." (Tr. 3871).⁵⁵

Mr. Basic's testimony with respect to Pesut was similar. He knew Pesut since 1972, and in his capacity as "secretary for the Croatian political body in New

⁵⁵ This quote is from Matanic's testimony. Needless to say, all of Matanic's testimony dovetailed with Mr. Basic's (See *e.g.*, 3826-3834).

York City", he enlisted Pesut's assistance (Tr. 2923-2924). Approximately a week before the hijacking, he told Pesut (Tr. 2925-2926):

"I might be going to Chicago the next weekend, and if he would be willing to join me because I would be—need his help. He asked me for what purpose. What is going on in Chicago. And I told him we had a secret meeting there and we needed to carry some books and leaflets out there. And if he would like to go for Croatian cause—it's a mission for Croatia, for our national cause. *And he should not talk to anyone if he decide to do, or if he doesn't decide to go along, he should not talk anyway to anyone at all.*"

Moreover, when he gave Pesut his ticket in a false name, he told him (Tr. 2935):

"[T]hat was all done because if anyone follows us from the Yugoslav Secret Service or anyone else, they couldn't discover that meeting which was a top secret for the Croatian cause."⁵⁶

Although Judge Bartels permitted all of this testimony, the Pesut-Matanic brief concludes this part by quoting him as saying (Br. 9): "I'm permitting all of this although I think it's not relevant" (Tr. 2872). Judge Bartels' statement, however, referred to an incident which occurred five years before the hijacking in which Busic claimed that he had been shot at in Berlin.

3. The final charge against Judge Bartels' alleged improper effort to limit evidence supporting the defense "theory" is his refusal to allow "direct evidence concern-

⁵⁶ Pesut's own testimony also dovetailed with that of Mr. Busic (Tr. 4058-4065, 4070-4072).

ing Basic's extreme predisposition to secrecy" (Br. p. 8, n. 9a). Of course, by this they do not mean Zvonko's Basic's testimony, but the proffered testimony of Dr. Diamond, who was going to testify that "*according*" to what Mr. Basic told him, the other participants "knew nothing of what * * * was going to happen", and that "*according to Basic*", they were to follow his orders implicitly and without inquiring as to any of the details of what was going to happen. Dr. Diamond's "*impression*" was that this is "a common and prevalent manner of operating under these circumstances." Moreover, this so-called expert was also prepared to say, that secrecy was consistent with Mr. Basic's state of mind. After all Basic feared for the security of the whole procedure, and believed his life was threatened, "he felt it best that the full responsibility for everything that happened and was going to happen be upon him, and therefore he informed no one of any details of the whole plan." (A. 505-06).

This proffered testimony of Dr. Diamond amounts to this: "I spoke to Zvonko Basic, he told me what he told the jury, and I believe that he is telling the truth." The lawyer for Pesut and Matanic does not have the nerve to suggest that there is a shred of authority for the admission of evidence of this kind, so he heaps it an omnibus assault on the fairness of the district court in presiding over the trial. Shame!

B. Judge Bartels Did Not Improperly Interject Himself Into The Testimony Of The Witness Dale Hochstetler

The next section of the Pesut-Matanic brief which contains an attack on Judge Bartels is the part captioned: "The Witness Dale Hochstetler" (Br. p. 15). According to Pesut and Matanic: "While there were episodes throughout the trial that demonstrated the court's hos-

tility to the defendant's attorneys and bias in favor of the government, the examination of the government's second witness, a male passenger named Dale Hochstetler, typified the court's bias."

We are happy to see this cited as the typical example of "the court's bias", because it represents a typical example of the distortion of the significance of a witness' testimony, and an overblown and misguided attack on Judge Bartels.

1. The testimony of Mr. Hochstetler that related to Pesut and Matanic's guilt or innocence, which is set forth at page 16 of the Pesut-Matanic brief, was corroborated in almost every respect by the defendants themselves or other passengers.⁵⁷ Julianne Busic and Noreen Collins, the passenger who kept a contemporaneous written account, both testified to seeing Matanic walking up and down the aisle with his hand in his pocket as if he had a handgun in it (Tr. 3713-3714, 4769-4770), and Ms. Collins testified, relying on her notes, that it was Pesut who

⁵⁷ The only testimony of Mr. Hochstetler that was contradicted related to the issue of venue. Mr. Hochstetler testified that shortly after he boarded the plane (its takeoff was delayed for 45 minutes), he went to the lavatory where he met Vlasic, who told him "This is a hijacking" and to return to his seat. This was one of the many "unambiguously corroborative" statements demonstrating their "unequivocal intention" to hijack the plane that this Court referred to in *United States v. Busic*, 549 F.2d 252, 257 (C.A. 2, 1977) in sustaining venue here. Although we continue to believe his statement was accurate, its truth or accuracy is really no longer of consequence in light of all the testimony that came out clearly indicating beyond any doubt the unequivocal intent of the hijackers to seize control of the plane when they boarded it, along with many acts corroborative of that intent.

came running down the aisle, holding a bomb in his hand, when the French jet passed, and directed the passengers to close the shades (Tr. 4781). Moreover, the defendant Matanic himself conceded that he may have had a conversation with Mr. Hochstetler in which Matanic told him that he was not doing it for himself, but he was doing it for the others (Tr. 3925), and Matanic also confirmed Hochstetler's testimony (Tr. 1816-1817) that he was told by Matanic that the hijacking was planned for a weekend in order to get more publicity (Tr. 3926). While Matanic denied there was any dynamite in the black bag Hochstetler saw him carry,⁵⁸ Matanic admitted that he himself picked up and carried one of the pot bombs (Tr. 3923-3924), and another defense witness testified that Matanic distributed leaflets (Tr. 3477).

The testimony of Mr. Hochstetler when looked at in the context of all the evidence against Pesut and Matanic, was at most cumulative.⁵⁹ Indeed, Hochstetler volunteered testimony about Matanic's solicitude for a passenger who had become ill. Moreover, he said a number of helpful things about Matanic to the F.B.I. immediately after the hijacking; so much so, that Matanic tried to make him his own witness. Unfortunately, Mr. Hochstetler was unable to recall those statements at the trial. As the Matanic-Pesut brief states (Br. 18):

⁵⁸ The defendant Matanic complains that while Mr. Hochstetler was permitted to testify to this "belief" that there was some kind of explosive (Tr. 1811) in the bag, "this latitude" was not extended to the defendant when an objection was sustained asking for Mr. Hochstetler's "impression". (Br. 16, n. 20). Since it is an offense to seize control of a plane by force, violence, or "intimidation", 49 U.S.C. § 1472(i), Mr. Hochstetler's "belief" was entirely relevant. On the other hand, the "impression" he was asked for by the defendant on cross-examination was not relevant at all (Tr. 1887).

⁵⁹ We did not, for example, once cite to Mr. Hochstetler's testimony in our statement of facts.

"Hochstetler also could 'not recall' that he had told Agent Connolly that Vlasic was upset because Matanic had not returned to the plane when, while in Paris, he had removed a sick passenger through the back door (T. 3197), or that Matanic was clearly angry with Vlasic when Vlasic forced the passengers to stand in the middle of the aircraft (T. 3198), or that Matanic had told him 'I don't want to die and I don't want anybody else to die or get hurt and we should be able to resolve all our difficulties without the violence' (T. 3198), and that 'the reason Vlasic was nervous while Matanic was out of the plane was because he spoke fluent French and the group was probably afraid of losing him' (T. 3200)."

And it is this crucial fact that puts much of the attack on Judge Bartels in proper perspective. The conduct of Judge Bartels, which is now assailed, that he elicited from Hochstetler that he had not slept before the F.B.I. interview, that he was simply saying he did not remember such statements, and that he was not "denying" what he said to F.B.I. agents (Pesut-Matanic Br. 18), were basically *helpful* to Matanic. In effect he was getting Hochstetler to admit that he may very well have said the helpful things attributed to him in the F.B.I. report, (Tr. 1897, 1943-1944), and simply did not remember saying them possibly because he had not slept.⁶⁰ Accordingly the defendant Matanic is simply talking out of his hat when he says that "any chance that Hochstetler would finally back down under the pressure of cross-examination based on Connolly's [the F.B.I. agent] report was effectively removed by the court; that is, that Hochstetler was not denying anything he simply didn't remember". (Br. p. 20). Since almost every statement of Hochstetler incrim-

⁶⁰ Of course the defendants, who were not shy at trial, did not object to any of Judge Bartel's questions.

inating Matanic would be corroborated by the defendants themselves, any effort to discredit him only undermined the credibility of the helpful statements he gave after the hijacking, but which he simply did not remember.⁶¹

Moreover, whether Mr. Hochstetler was "denying" making the statements or was simply unable to "recollect" them, was critical to whether Judge Bartels would permit extrinsic evidence to "impeach" Hochstetler's credibility. See Weinstein's *Evidence*, § 607[06], pp. 66-67. Normally, a trial judge has considerable latitude in permitting extrinsic evidence to "impeach" a witness who claims he cannot recall making a prior statement. *United States v. Insana*, 423 F.2d 1165, 1169-1170 (C.A. 2, 1970), Bartels, J. Yet Judge Bartels, who allegedly intended "to go as far [he] could without reversal", let the F.B.I. agent testify as to Mr. Hochstetler's helpful prior statements (Tr. 3190-3205).

There is little, in short, to support the claim that Judge Bartels did anything to seriously prejudice the examination of Dale Hochstetler. Obviously in light of the overwhelming corroboration for the incriminating testimony

⁶¹ In a long footnote, taking almost a page, Br. 19, n. 22a, defendant Matanic berates Judge Bartels for not admitting in evidence a picture taken after the hijackers surrendered, and after the hijackers learned of the death of Officer Murray. The picture showed Matanic, Hochstetler and a third male passenger with their arms around each other smiling. Metanic—not Hochstetler—was holding a small empty bottle of J & B Scotch. This evidence, according to Matanic, "strongly corroborat[ed]" Matanic's claim that Hochstetler was a drunkard (Br. 19, n. 22a). The picture, of course, was more pertinent in showing that Matanic was drinking, rather than Hochstetler, and was totally irrelevant. Indeed, as we have seen, in the end the defendants had more to lose by discrediting Hochstetler than did the United States. In any event, Matanic persisted on at least a dozen occasions in badgering Judge Bartels to let the picture in evidence. And they wonder why he occasionally snapped at them.

Mr. Hochstetler gave, any impropriety was surely harmless.⁶²

C. The District Court Permitted An Extraordinary Amount Of Marginally Relevant Evidence Tending To Support Their So-Called "Alibi".

The third heading of the Pesut-Matanic brief attacking Judge Bartels is entitled "The District Court's Treatment of The Defenses". The so-called defense was an effort to illicit pages of marginally relevant self-serving testimony attempting to show how Pesut and Matanic spent the week preceding the hijacking and what they packed in the luggage they took with them. Although Judge Bartels let in a substantial amount of this testimony, the defendants cite three or four examples of improper comment he allegedly made. These arguments are without merit. And we again show he let in too much, not too little.

1. The defendants Matanic and Pesut say they offered testimony of what they packed in their bags for their trip to Chicago, and that they "took no weapons or any other device to further an airplane hijacking." According to them, Judge Bartels belittled this evidence, saying that "'we don't want every tiny detail' (Tr. 3874); see also, 4014-4017" (Br. 22).

⁶² There is one last statement in the "Dale Hochstetler" part of the brief that warrants a response. The Pesut-Matanic brief says that Judge Bartels "sharply reprimanded counsel for Matanic when, caught in a contradiction in his testimony, Hochstetler testified that he had fully reviewed Agent Connelly's 302 report when he was interviewed by the Assistant U.S. Attorney, although he had earlier testified that he never fully reviewed the report." (Br. 20). The "reprimand", if you can call it that, however, was not for eliciting any contradiction, but for the incorrect statement of Mr. Matanic's counsel that: "I thought the first time you received it *fully* [the report] was this morning in court" (Tr. 1949-50). Mr. Hochstetler had not given such testimony (Tr. 1894-1895).

Judge Bartels' comment that "we don't want every tiny detail" preceded an incredible effort to go through every item in Mr. Matanic's luggage. Judge Bartels, in trying to move the case along, said (Tr. 3873-3874):

Well, we don't want every item. He can characterize it his personal belongings, his personal attire, if he wants to say that, shirts, etcetera, but we don't want every tiny detail."

This was a perfectly proper innocuous comment. And, in fact Mr. Matanic's counsel deliberately ignored Judge Bartel's instruction, and attempted to go through every "tiny detail" (Tr. 3874).

2. Next, according to the Matanic-Pesut brief, Judge Bartels prevented them from showing "that in the week before the hijacking they did nothing that would show that they were part of the conspiracy which was alleged to have begun about September 6, 1976" (Br. 22). This claim is utterly frivolous. Judge Bartels not only permitted them to call two witnesses (Br. 22, n. 25), but he let them both testify at length about what they said they did beginning on September 4, 1976 until September 10, 1976. Mr. Matanic, for example, was permitted to give testimony that he went to Toronto, Canada on September 5, 1977, although Judge Bartels quite properly refused to permit the introduction of a post-card he wrote to his girl friend, Matanic also testified, over objection, that he returned to New York the following day, and that on September 7, 1977 (Tr. 3842-3843):

Tuesday, I was most of the time home with roommate. My roommate, Joe. Because Joe never works Mondays and Tuesdays. He was working Saturdays and Sundays. So he was off Monday and Tuesday. That day I spent most of time home. And in the evening we—then went up to—there is a Ukranian soccer field—

* * * * *

THE COURT: All right, you were in a Ukranian—go ahead. I will permit it.

THE WITNESS: That evening we went to Ukranian—to the Ukranian soccer field.

THE COURT: You and Joe went to a Ukranian soccer; is that right?

THE WITNESS: Yes.

Mr. Matanic's testimony continued along those lines for page after page and culminated with the following statement (Tr. 3853):

"A. I went to the butcher store and ordered one small pig for Paul Cindric. He was planning to make birthday party for his son. * * * The rest of the day I stayed home and wait until my roommate Joe comes home and when he was ready then we took a ride to the Bronx.

We went to the Bronx, Joe, girlfriend lives in the Bronx and we went to see her on the way—

THE COURT: No, no. Just say you attended to personal matters. All these tiny details are not essential and just clutter up the record."

Judge Bartels' comments, which are cited as improper at p. 23 of the brief, were perfectly proper efforts to move the trial along. None of this evidence proved that Matanic did not plan or participate in the hijacking. Indeed, by his own testimony, he found time to have dinner with his co-conspirators at the Top of the Park, on the night before the hijacking, and receive his plane ticket in the name of S. Radic, and his instructions to proceed to LaGuardia; nor did this testimony prove that he did not participate with the hijackers in the five or six dry runs prior to the hijacking (Tr. 4779).

3. Matanic and Pesut are also critical of Judge Bartels' remarks on evidence that both Matanic and Pesut trusted Basic but, "that by reason of their belief in the need for secrecy in matters involving Croatian independence, they reasonably accepted such things as Basic's secretiveness, the false names on their airplane tickets and the manner in which Basic had directed that they come to the airport" (Br. 23-24). Moreover, in terms of the defense of coercion, it was allegedly important to show, "that from what they knew of Basic, he was a deadly serious person whose personal commitment to Croatian independence extended as far as suicide" (Br. 24). According to the defendant, Judge Bartels "effectively limited the inquiry of Matanic along those lines and indicated that such matters were irrelevant to the issues of the case (e.g., Tr. 2965, 2968-69, 2970, 3829-34)" (Br. 24).

We have already shown the extent to which Judge Bartels let in evidence of Basic's secretiveness, his fear for his life and the Yugoslav secret police, and the nature of his relationship with Matanic and Pesut (see, *supra*, pp. 78-82). All of the transcript references are to instances in the "cross-examination"⁶³ of Basic by Matanic's counsel where he sought to retread the same ground. So, for example (Tr. 2969):

"Q. Did you have any conversation about the—
THE COURT: What did you tell him in April?
Did you say anything other than you talked about
the subject of Croatian independence? If you want
to say that, that's all right.

MR. BERGMAN: I'm sorry—

⁶³ One of the references, Tr. 3829-34 was to Mr. Matanic's examination, where so much of this also came out, and Judge Bartels was simply trying to move the case along.

THE COURT: If he wants to say to him that he spoke to him about the subject matter of Croatian independence and the necessity of doing something for the cause, that's all right, but we are not going to go into the final details of what he said—

MR. BERGMAN: I think we can keep to that line, your Honor."

This again is indicative of the proper efforts Judge Bartels made to move the case along, to limit so much irrelevant material, and to prevent the attention of the jury from being diverted from the hijacking of Flight 355 to the cause of Yugoslav separatism.

4. We believe we have shown enough, without burdening this brief further, that Judge Bartels, if he was guilty of anything in the way of treating the defense case, bent over to the extent of giving too much rather than too little,⁶⁴ and his remark—quoted as evidence of his misconduct (Br. 25)—is indicative of how far he went:

"Well, we let so much hearsay in that I don't mind letting this in. I am not going too far with irrelevancy, however" (Tr. 2970).

D. Judge Bartels Did Not Improperly Interfere With The Witness Thomas A. Davidheiser.

The defendant Matanic again begins yet another part of his attack on Judge Bartels, entitled "The Witness Thomas A. Davidheiser" with an overblown statement of the significance of his evidence. According to him, our case "depended in large part upon the post arrest state-

⁶⁴ Needless to say he allowed each of the defendants to give a full biography, including the suffering that either they or their families allegedly endured in Yugoslavia (Tr. 2830-2858, 3512-3521, 3814-3825, 4049-4052).

ments attributed to him by an F.B.I. agent, Thomas A. Davidheiser". Indeed, we are told in a footnote that "[t]he jury, in its deliberations, requested that the testimony of Davidheiser be read back" (Br. 25, n.26).

Of course, as we have shown, the testimony of Agent Davidheiser contained exculpatory material on the issue that apparently concerned the jury, the offenses of air piracy resulting in death.⁶⁵ Moreover, on the offense of air piracy, it only tended to substantiate Matanic's conduct on the plane, and the contemporaneous incriminating statements he made to the passengers on the plane. Matanic confirmed telling Mr. Hochstetler (Tr. 1816-1817) that the hijacking had taken place on a weekend because it would generate greater publicity (Tr. 3925-3926). Moreover he told other passengers that tickets had been purchased ten days earlier, that they all had one-way tickets to Chicago, and that "they had made five or six dry runs to see if they could get the explosives through security" (Tr. 4779). And, in response to a question how they could justify harming the passengers, Matanic and Vlasic said: "[W]ell you don't understand. It is to be condoned because if you did understand the seriousness of our position you would understand that that would have to be done (Tr. 1619)."

These admissions aside, Matanic also admitted he never told Agent Davidheiser he had been tricked by Busic into going on the flight (Tr. 3966). And, Matanic would not even deny he said most of the incriminating statements to Agent Davidheiser; he merely said he could not remember them (Tr. 3974-3975). This was a rather strange answer for someone who claimed to be innocent, or to be accurate, one who said he only "assume[d] I didn't know nothing" about the hijacking (Tr. 3926).

⁶⁵ According to the instructions Judge Bartels gave the jury, Mr. Matanic had to know of the existence of the bomb in Grand Central Station, and Agent Davidheiser had said Matanic denied that he knew about it (Tr. 4372).

So unnecessary was the post-arrest confession to our case it was not even offered in the direct case. And this brings us to one of the principal attacks on Judge Bartels, i.e., that on Matanic's direct, before the confession was offered, Judge Bartels thought it was premature to allow questions relating to the circumstances of the confession (Br. 28).

Judge Bartels, however, apologized for characterizing it as a "defusing operation". "I strike that word off. I was just—the ruling is the same, but the phraseology should be changed completely. I mean you are anticipating questions to be asked and I don't think this is the proper time. You can ask those questions later" (Tr. 3948). Moreover, Judge Bartels later changed his mind, and agreed to permit "two or three questions" (Tr. 3949), which turned into four or five pages (Tr. 3949-52), and most of those did not involve the circumstances under which the confession was taken, but a subsequent statement Matanic made to a New York County District Attorney (Tr. 3950), as well as the extent of his contact with Busic following his arrest (Tr. 3951).

On redirect examination, when Judge Bartels thought Mr. Matanic's counsel would cover the same ground, he is "accused of immediately chilling the examination, giving the jury the impression that whatever was to follow had already been heard, when, in fact, it had not" (Br. 28, n. 28). This, however, is not true; once Mr. Matanic's lawyer explained that he intended to cover new material in connection with the prosecutor's examination, Judge Bartels immediately agreed to allow the questions (Tr. 4020).

The rest of the point on Mr. Davidheiser's examination, as distinguished from Matanic's explanation, deals with alleged instances of Judge Bartels coming to his aid on matters so immaterial as to warrant no extensive discussion here. His conduct was, when read in context, clearly

that of a judge trying to be sure the jury carefully understood what was going on. And all of Matanic's misleading nit-picking does not change the overwhelming nature of the case against him, which surely rendered any interference with Mr. Davidheiser's testimony harmless.⁶⁶

E. Judge Bartels Properly Excluded The Eyewitness Expert Testimony.

Although the defendants Matanic and Pesut claim that Judge Bartels deprived both of a fair trial, most of the insubstantial arguments that have been advanced so far involved Matanic. The first that really involves Pesut is perhaps the most frivolous, and that is Judge Bartels' decision excluding the expert testimony offered on eyewitness identifications (A. 551-556). We shall not spend the time here that we did in the district court justifying that decision nor string cite the case law supporting Judge Bartels' decision (A. 545-547). Suffice it to say that Judge Bartels instructed the jury, as a matter of law, on much if not all of what this expert would sim-

⁶⁶ Typical of this is Matanic's claim that Judge Bartels came to the aid of Davidheiser when he was asked if he "edited" the handwritten notes of his interview with Matanic (Br. 31-32). Judge Bartels, however, allowed this question to be asked and answered twice (Tr. 4379), before he sustained yet a third objection to the same question (Tr. 4380). Similarly, Matanic chastizes Judge Bartels for interrupting him when starting "from square one" he asked Mr. Davidheiser (Tr. 4382-83) if he "copied his rough notes verbatim" (Br. 32). What Matanic fails to say is that this was the "umpteenth" time he put the same question to Davidheiser. Just three pages earlier in the transcript, the following colloquy appears (Tr. 4379):

Q. Did you take anything down he said verbatim?

A. Not that I recall, no.

Q. You just sort of edited what he was saying?

A. Yes, it was impossible to write out everything totally word for word in longhand."

ply have testified to as opinion (A. 627-632). And, of course, as we have shown, the jury, after asking for the eyewitness testimony to be read back, acquitted Pesut of the charge of air piracy resulting in death. Had they credited the eyewitness testimony, under Judge Bartels' instruction on Count One, the verdict would have been guilty. (See, *supra*, pp. 28-31). So not only was there no error, but there was obviously no prejudice.

F. The District Court Did Not Improperly Interfere With The Effort To Undermine The Credibility of John Derdak.

The next frivolous point in the attack on Judge Bartels again involves only the defendant Frane Pesut. The charge this time is that he improperly interfered with a language expert, William Derbyshire. Mr. Pesut, who lived in the United States for five years (Tr. 4227), claimed he was unable to speak enough English to ask the gentlemen at Grand Central Station whether the lockers were safe. Although contrary to the claim at Pesut's Brief 38, n.37, the expert did testify that Pesut "knows virtually no English" (Tr. 5018). Pesut's claim that he could not speak English was demolished by the taxi driver who drove him to the airport on the fateful day (Tr. 4707-4710) ⁶⁷ and the passenger who heard him run down the aisle, with a pot bomb in his hands, yelling "close the shades" when the French jet appeared (Tr. 4782).⁶⁸

This, however, was not the only reason Pesut needed an expert. You see, Mr. Pesut confessed to an F.B.I.

⁶⁷ Mr. Pesut said he told the taxi driver nothing but the name of the airport (Tr. 4240). The taxi driver testified to a relatively long conversation with Pesut (4707-4710).

⁶⁸ Mr. Pesut claimed that after five years in the United States, he did not know how to say "close the shades" (Tr. 4238).

agent who spoke Serbo-Croatian, a term used to describe a series of dialects spoken in Yugoslavia (Tr. 431). This expert, whose judgment about Mr. Pesut's ability to speak English was shown to be worthless, testified, based on his interview with Pesut, that Agent John Derdak could not understand what Pesut was saying. Judge Bartels, if anything, abused his discretion in letting this testimony in, and the very least he could do was to intervene to the extent that he did. Again, however, Pesut's brief distorts the record. The ever increasing necessity for brevity permits us to show only how unsubstantiated was the testimony, how improper was its admission, and how harmless any comment by Judge Bartels was.

John Derdak, the agent, was born in the United States to Croatian parents; Croatian was his first language (Tr. 4470), he had spoken it all his life (Tr. 4470), and he still speaks it with his mother. Moreover, he had special training in that language at the Army language school in California for one year (Tr. 4461). The principal attack on Agent Derdak's knowledge of Croatian was that his parents, although Croatian, were from Austria (Tr. 400), where a different variant of Croatian allegedly is spoken from that which is spoken on the coast of Yugoslavia from which Pesut came (Tr. 437). Indeed, the variant Pesut spoke is different from the variants spoken in other parts of Yugoslavia (Tr. 445), although Pesut apparently had no trouble communicating with his accomplices, including Julianne Busic who probably spoke Croatian with an "Oregon" variant.

Mr. Pesut's problem in attacking Derdak's ability to communicate with him on those grounds is that after leaving Yugoslavia, Pesut spent approximately a year in Austria (Tr. 4046-4047), where there is a substantial Croatian minority (Tr. 403, 439). Moreover, Pesut spent five years in the United States associating exclu-

sively with members of the Croatian community (Tr. 442-443). The "expert", Mr. Derbyshire, however, never asked Pesut what dialect he spoke with the Croatians he met in Austria (Tr. 472):

Q. Did you consider it important to find that out?

A. No, I did not.

Nor was Mr. Derbyshire interested in finding out what dialect people from Croatia he associated with in the United States spoke (Tr. 473).

Q. You weren't interested in that?

A. No.

Moreover, the "expert" acknowledged that there may very well have been communication between Pesut and Derdek, even if there was no total comprehension (Tr. 474). As he explained at trial (Tr. 4992):

"There will certainly be communication, it will take place. They will understand words and phrases. But 100 percent communication, I would not think would take place."

And guess what! According to the "expert", Agent Derdek understood most of what Pesut said (Tr. 5037-5050), except the statement that Basic told him there was going to be a hijacking.

Judge Bartels could have easily excluded this testimony, yet he let it in. The fact that he may have occasionally intervened in a manner that was entirely proper in context, hardly supports a claim that he was "biased".

G. Judge Bartels Did Not Improperly Interfere With The Summations.

The final assault on Judge Bartels is his alleged interference with the summation of Matanic and Pesut. This begins with a series of misstatements (Br. 42-43). The first, which we pointed out earlier (*supra*, p. 65 and n.42), was that "all sides" agreed that there would be no interruptions by opposing counsel. Although there was no such agreement, the summations of the Assistant United States Attorney, and those of the attorneys for defendants Zvonko and Julienne Busic were not interrupted once by an objection. In contrast, Matanic and Pesut allege the court "repeatedly [and improperly] interrupted the summations of counsel for Matanic and Pesut and, by those interruptions encouraged government counsel to do so" (Br. 43). This statement is likewise untrue. And to prove it we will begin with the summation of Mr. Pesut's counsel, Mr. Rochman, who summed up before Matanic.

1. The Summation of Mr. Pesut's Counsel

Mr. Rochman began his summation with what appeared would be a blatant appeal to sympathy. After telling the jury that they had to resolve a question of great importance and that they "were dealing with the fate of another human being" and that the "stakes are very high", he appeared to be going on to other heights of eloquence when Judge Bartels stopped him, and reminded him that there was an agreement that there would be no appeal to sympathy (Tr. 5483). Mr. Rochman then proceeded for eleven pages without interruption until he began to tell the jury that "Croatsians who live in the United States believe that the Communist Belgrade government secret police observe the" (Tr. 5494).

Of course, Mr. Rochman had no basis, and certainly none in the record, for making a statement about what "Croatsians who live in the United States believe". Although Judge Bartels instructed the jury that there is "no evidence" as to what Croatsians believe in general (Tr. 5496), he then admonished the Assistant United States Attorney, in front of the jury, not to interrupt the summation with objections (Tr. 5495):

THE COURT: It's going to be hard. The defendants restrained themselves until Mr. Schlam was finished. So I will ask Mr. Schlam to refrain himself until the defendants are finished and then he can make his objections after they are finished, or after Mr. Rochman is finished, and then he can pass on.

Mr. Rochman then spoke for some sixteen pages, with one minor interruption, until he told the jury that they should not credit the confession unless they were satisfied "beyond a reasonable doubt" that it was accurate (Tr. 5511). Judge Bartels interrupted only to say that, while the jury must consider the accuracy of the statement, only guilt need be determined beyond a reasonable doubt (Tr. 5551).

Again Mr. Rochman continued without interruption until he started talking about the law, and began testifying as an expert witness on eyewitness identification (Tr. 5516). Judge Bartels simply told him "to stick to my identification charge" which provided pretty powerful ammunition. And Mr. Rochman spoke on that issue, with success as we have seen, for eight pages without interruption, until he asked for a recess (Tr. 5524), and then he spoke about it again for another eleven pages, when he again made himself the expert (Tr. 5536): "One of the phenomena that occurs in identification testimony is people fill in; that is, they fill in as they go the

details to make—". Judge Bartels then properly stopped him, and told him not to give his opinion (Tr. 5536).

Mr. Rochman then continued with his attack on the eyewitness identification, with a minor interruption about the accuracy of a particular factual statement (Tr. 5539, 5541) for another ten pages. At that point he had spoken for an hour and a half, the agreed upon time, and Judge Bartels asked to see if he could finish up in about fifteen minutes (Tr. 5547).⁶⁹

Mr. Rochman then spoke for twelve more pages without interruption until he tried to explain a photograph, taken after the surrender of the hijackers, showing Pesut smiling. According to Mr. Rochman, Pesut "smiles when he doesn't understand" (Tr. 5559). Judge Bartels inquired as to what proof there was of that, and Mr. Rochman said, one of the salesmen who sold him a suit testified to that. In fact, the testimony was quite the opposite of what Mr. Rochman represented. The suit-salesman indicated that Mr. Pesut's smile reflected satisfaction (Tr. 5141),⁷⁰ and Judge Bartels' interruption was quite proper, particularly since he told the prosecutor not to object.

Mr. Rochman then went on to complete his summation, with but one other significant interruption (Tr. 5569-5570), when he again went beyond record (Tr. 5569): "And the one thing Frane Pesut is not is a political radical." Of course, there was no evidence for this. Indeed, even if one accepts his story, the mission he thought he was going on was not for the Boy Scouts.

⁶⁹ The Assistant United States Attorney who had to deal with four defendants had spoken for five and one half hours and Mr. Rochman was the first of the defendants to sum up.

⁷⁰ The testimony was as follows (Tr. 5141):

"Q. You say you got a smile out of him?

A. Yes, he smiled. He looked happy with it."

This then is the sum and substance of the "bias" Judge Bartels is alleged to have shown (Br. 50) during the summation of Frane Pesut that ran some ninety pages. We submit that almost every one of the handful of interruptions was proper, particularly since the prosecutor was told not to interrupt. The claim that this shows "bias" on the judge's part is again another one of the desperate malicious libels against Judge Bartels.

2. The Summation of Mr. Matanic's Counsel

The summation of Mr. Bergman ran for approximately 100 pages following Mr. Rochman. Together they exceeded the summation of the Assistant United States Attorney by thirty pages. The Matanic brief claims that on seven occasions his counsel was improperly interrupted. This claim is without merit. Mr. Bergman began his summation by subtly suggesting to the jury that they should not be afraid to return a verdict in the face of the evidence,⁷¹ and that "the result of this trial, whether it be conviction or acquittal for Petar Matanic, is immaterial to the Government" (Tr. 5577). After this misstatement was corrected, Mr. Bergman spoke for some twenty pages until he said that Mr. Matanic enjoyed "the admiration of the entire community" (Tr. 5591). When Judge Bartels inquired as to the support for this statement, Mr. Bergman responded (Tr. 5591):

"I was making a political reference to Father—

THE COURT: We're very prosaic in this court."

⁷¹ "Your decision is supreme. You are like ancient Kings. And nobody, not Judge Bartels *** the President of the United States can change your decision on the facts of this case. You are supreme. And it's with that supreme majesty in mind that Zvonko Basic awaits your judgment" (Tr. 5577).

Mr. Bergman's summation then continued until he said: "Zvonko Basic began instilling over the course of the next months in Petar Matanic a sense of guilt, a sense of shame" (Tr. 5593). Judge Bartels properly interrupted to ask where the evidence was for that. Although Mr. Bergman now cites this as one of seven improper interruptions (Br. 47), he cites no evidence to support his statement to the jury, but simply goes on to charge that "the court refused to allow counsel for Matanic to recount the substance of Basic's statements to Matanic during the several meetings they had in the Spring and Summer of 1976" (Tr. 5595). Of course, Judge Bartels did not "refuse to allow" Mr. Bergman to recount the substance of any meetings (Tr. 5595). Indeed, perhaps Mr. Bergman did not want to recount the substance of those meetings, because Basic's testimony about their first meeting (Tr. 2966) established quite the opposite of what Mr. Bergman was saying. Rather than having to instill shame in Matanic, Basic described him as a ready volunteer (Tr. 2968). "He said, that he would like to help Croatia cause somehow because he feels strongly concerned about future Croatian nation but he did not no [sic] himself what do and where to start."

Mr. Bergman's summation then proceeded along for the next eleven pages with brief objections from the prosecutor, once when Mr. Bergman personally attacked the prosecutor's cross-examination of a witness as "arrogant" (Tr. 5600), and at another time when he implied that the United States had something up its sleeve (Tr. 5597). And Mr. Bergman does not claim that these two objections come within the seven that demonstrate judicial bias.

Mr. Bergman does, however, take exception to the next objection. Mr. Bergman began to argue that "let's sort of transfer ourselves out of the evidence of this case and make believe the evidence showed close association—not even a very close—a close association between Zvonko

Basic, Petar Matanic, Frane Pesut, Mark Vlasic and Julienne Basic" (Tr. 5605). The prosecutor objected to the word "make believe", largely because the evidence, contrary to the suggestion, showed that most of the defendant's knew each other. Of course, Zvonko and Julienne were married; they both knew Mark Vlasic and Pesut and Matanic. Indeed, Mr. Bergman's client himself admitted he knew each of them except Pesut (Tr. 3857-3858). But, even assuming the objection was improperly sustained, it is obviously harmless because Mr. Bergman quite smoothly went on to make the point without any problem (Tr. 5606). Indeed, he got carried away and made the plainly erroneous statement, without objection, that "the evidence shows they didn't know each other" (Tr. 5606).

Mr. Bergman then proceeded for some sixteen pages, with one minor proper objection by the prosecutor (Tr. 5613) until the third alleged improper (Br. 46) objection when Mr. Bergman said that Captain Carey testified that Petar would go up to Zvonko Basic, "and Zvonko would say go away. I haven't time to talk to you" (Tr. 5621). At this point, Judge Bartels properly interrupted and said he recollected no such evidence (Tr. 5621). Mr. Bergman now says there was such evidence (Br. 46) and cites pages 1554 and 1693 of the transcript. Of course, these citations again prove that Judge Bartels was right.⁷²

The next allegedly improper interruption by Judge Bartels (Tr. 5623-24), who was now justly suspicious, came after Mr. Bergman suggested that the reason Mata-

⁷² The only statement remotely pertinent at Tr. 1554 is this: "[Basic] was asked questions by members of the group as to whether he might have permission to do something and he would give his approval or disapproval as he saw fit."

At Tr. 1693, Captain Carey says Julie often got access to Zvonko, and that she got "special audience with him that possibly he would not have tolerated from the others."

nic returned to the plane after leaving it in Iceland was because of his "fear for the safety of other passengers who might suffer at Busic's hands should Busic panic at Matanic's absence" (Br. 48). Again, the transcript references now cited at p. 48 of Matanic's brief (Tr. 3907, 3962) simply fail to support the claim that Matanic gave this as the reason for returning to the plane after he was permitted to leave in Iceland. Mr. Bergman, however, persuaded Judge Bartels that it was, and he gave an unnecessary apology and corrective instruction the next day (Tr. 5685-86).

The summation, in any event, continued for another fifty pages, with some minor interruption by the prosecutor and judge, most of which were quite proper, and only three of which complete the total of seven set out in Matanic's brief. Again, they are without merit.

Thus, Mr. Bergman claims that he was trying to argue that F.B.I. Agent Davidheiser, to whom Matanic did not recall confessing, had fabricated a critical piece of incriminating evidence regarding the meeting had at the Top of the Park by the hijackers the night before the hijacking. To prove that, he wanted to show that Pesut, who also confessed to Agent Derdak, did not make mention of the meeting. When Judge Bartels first heard the beginning of that argument (Tr. 5657-5658), he apparently thought that Mr. Bergman was going to say something prejudicial to Pesut, and asked Pesut's counsel if he had an objection—a perfectly proper comment to which Mr. Bergman now attaches sinister overtones. As usual, however Mr. Bergman got carried away and said that "according to Agent Derdak", Pesut told "them everything" (Tr. 5659). And it was at this point that Judge Bartels sustained the objection, about which Mr. Matanic complains in his brief (Br. 50), and told him "No, there is no evidence of that. Why don't you defend your own client" (Tr. 5639). While the latter comment may have been a bit too strong, it was now late in the evening of a

long day, the incident was one of many in which Mr. Bergman made statements unsupported by the record, and Mr. Bergman then went on for two pages to make his point without interruption.

The next allegedly objectionable comment by Judge Bartels again demonstrates that it was Mr. Bergman who was acting improperly. To show that Mr. Matanic did not confess to Agent Davidheiser, Mr. Bergman argued that after the interview with Davidheiser, when Matanic was interviewed by an Assistant District Attorney, he allegedly asked for a lawyer. Again Mr. Bergman got carried away (Tr. 5665):

"Somebody who confesses to the crime doesn't ask for a lawyer after he confessed."

Of course this preposterous statement, for which there is no basis, prompted an objection from the prosecutor and moved Judge Bartels to make the clarifying statement he made to the jury which is now cited as proof of his bias (Br. 56). The comment was perfectly proper in context, and again after being corrected, Mr. Bergman went on to make the argument the way it should have been made (Tr. 5666-5667).

And that brings us to the last final silly claim (Br. 44). At the end of this one hundred page summation, during which Mr. Bergman acknowledged he was being long winded (Tr. 5661), he said that Agent Davidheiser knew that "nine out of ten times the jury is going to believe him * * *," instead of simply saying that Agent Davidheiser probably expects that the jury would believe him. Whether the objection should have been sustained to the "nine times out of ten" or to the "percentages" is hardly material.

We believe in sum that none of these arguments show that Judge Bartels unfairly prejudiced the summations of Pesut or Matanic. And, as we observed earlier (*supra*, p. 65) Judge Bartels gave a strong and cautionary in-

struction on how his remarks were to be treated (A. 574-576). See, *United States v. Beradelli*, *supra*, 77-1132, slip op. 6272. Had Mr. Bergman stuck to the record and not gotten carried away, there probably would have been few, if any, objections. But the day has not yet come when a federal judge or prosecutor must sit by quietly when counsel for a defendant misstates the record or asks improper questions. On the contrary, a federal judge sits to see "that justice is done before him" and "it is his duty to see that a case on trial is presented in such a way as to be understood by the jury as well as himself." *Simon v. United States*, 123 F.2d 80, 83 (C.A. 4), *certiorari denied*, 314 U.S. 694 (1941); *United States v. Rosenberg*, 195 F.2d 583, 594 (C.A. 2), *certiorari denied*, 344 U.S. 838 (1952).

H. Conclusion

The defendants Pesut and Matanic have failed to sustain the wholly improper attack on Judge Bartels as being biased. Pesut's claim, when isolated from Matanic's, amounts to nothing. Indeed, as the large bulk of his lawyer's summation indicates, the evidence was so overwhelming that all he was hoping for was the acquittal he got—thanks to Judge Bartels' charge—on air piracy resulting in death. Mr. Matanic's claims likewise amount to next to nothing; they show Judge Bartels to have been generous beyond words in admitting marginally relevant evidence, merely designed to inspire sympathy rather than a legitimate defense, and his interruptions of the summations were largely the product of counsel's misstatements. And, of course, his acquittal on Count One puts the final lie to the claim that he was prejudiced by Judge Bartels.⁷³

⁷³ Like the defendant Julianne Busic, see, *supra*, p. 73, n.49 the defendants Matanic and Pesut try to bolster their attack on Judge Bartels by claiming that the prosecutor made a handful of improper statements which they claim Judge Bartels should have

[Footnote continued on following page]

POINT II

The District Court Did Not Err In Refusing To Order The Disclosure Of F.B.I. 302 Reports Prior To Trial.

The district court judge wrote an extensive and reasoned opinion justifying his refusal to order the disclosure of the F.B.I. 302's of the passengers and crew (A. 243-246) and we shall not repeat his legal arguments here. Again, however, the Pesut-Matanic brief fails to give a fair and accurate statement of the facts.

1. Prior to trial the defendants, who did not lack for financial resources, were provided with a list of all of the passengers (Tr. 68, Feb. 24, 1977), and Mr. Matanic, the only "indigent" defendant, had an investigator appointed for him. There is no allegation that Pesut and Matanic were unable to interview these witnesses, or that any specific request was made for a 302 of a witness who refused to be interviewed.⁷⁴ The defendants had every

interrupted (Br. 56-57. Of course, no objection was taken, during or after the summation, to most of the comments cited as improper, and the defendants Pesut and Matanic do not even have the nerve to raise the issue as a separate point. The necessity for brevity requires a response only to the two examples of the prosecutor's alleged misstatement of the evidence (Br. 56). There was ample evidence to support the inference that Matanic walked down the aisle with what was probably a tear gas gun in his pocket (See, *supra*, p. 6), and there was likewise evidence for the prosecutor's statement which is misstated in the Pesut-Matanic Br. p. 56, that Matanic said we had "five or six runs to see if we could get the explosives through security (Tr. 5359). See, *supra*, p. 9. The remaining comments cited at pp. 56-57 are appropriate in the context in which they were delivered after a long and contested trial.

⁷⁴ The defendants called several passengers and crew as witnesses (Tr. 3221, 3451, 3486, 3260).

opportunity to discover "favorable" evidence from the passengers. Under these circumstances, it is debatable whether there was any obligation, even under *Brady*, to turn over the 302's. *United States v. Stewart*, 513 F.2d 954 (C.A. 2, 1975); cf. *Xydas v. United States*, 445 F.2d 660, 667 (C.A.D.C.), *certiorari denied*, 404 U.S. 826 (1971); *United States v. Pollak*, 474 F.2d 828, 832 C.A. 2, 1973).

2. We declined to turn the 302 reports over *en masse* for two reasons. The interviews with the passengers contained statements incriminating these defendants and we were not inclined to tell them which witnesses were susceptible to the terror which they put them through on the plane. Mr. Busic's far-fetched tale aside, it is obvious the defendants were not working alone. Moreover, as later events bore us out, we had good reason to believe that a perjured defense would be put in,⁷⁵ and we were not about to alert the defendants to potential testimony that might prove them to be liars. As Judge Mansfield observed in an analogous context [*United States v. Louis Careau, Inc.*, 42 F.R.D. 408, 413, 414 (1967)]:

"If, * * * the Government were required upon request routinely to furnish the defendant's prior statement to him in advance of trial, the jury's all-important quest for the truth would in many cases be threatened by the prospect of the defendant's tailoring his trial testimony to suit his prior statement rather than giving his honest recollection of the facts. The prospect of a jail sentence and deprivation of his liberty, if found guilty, provides a strong motive to lie. It is naive and wishful thinking to suppose that a defendant who is furnished before trial with his own prior statement will not frequently yield to the tempta-

⁷⁵ We do not make this statement idly. But for the sentences they received, there is sufficient basis to prosecute them for perjury.

tion either to change or mould his trial testimony to the extent necessary to reconcile it with the prior version, or patently concoct plausible reasons calculated to explain away inconsistencies, rather than adhere to his oath as a witness to tell the truth."

3. Nevertheless, we were particularly sensitive toward our obligations.⁷⁶ But the defendants wanted to be cute. At the outset, they refused to disclose to the United States information that would permit us to make the determination whether there was anything "favorable" in the 302's. Said Matanic's lawyer (Tr. 83, Feb. 24, 1977):

"I don't suppose the Government could make that unilateral determination without my disclosing what our defense is to the Government. I'm not going to do that."

Moreover, even at trial, Matanic's lawyer was equally unreasonable. Rather than specify what in particular he considered Brady material, he said "any 302 describing my client's conduct aboard the plane is Brady material" (Tr. 3244). Of course, this request was overbroad since it obviously encompassed incriminating material. On the other hand, after at least some of the defendants became more specific, particularly Julianne Busic (Tr. 3340), Judge Bartels ordered that the 302 be re-examined and submitted to him *in camera* (Tr. 3344). He then ordered several to be turned over to Mrs. Busic's lawyer. Moreover, the Assistant United States Attorney told Judge Bartels that he had reviewed the 302's—as to all the defendants—in light of his earlier rulings (Tr. 3345-51) as

⁷⁶ We agreed to turn over 302s of any witness the defendants called that contained inconsistent statements (Tr. 2616).

to what was Brady material (Tr. 3346, 3579). Consistent with our theory of why the defendants wanted these documents, Mrs. Busic's lawyer said nothing in the 302's turned over surprised him, and while he thought they were Brady material, he did not intend to call any interviewees as witnesses (Tr. 3578-3579).⁷⁷

The procedure followed by the district court was plainly correct.

POINT III

The Sentence Imposed On Pesut And Matanic Was Perfectly Proper.

The defendants argue that imposition of sentence on them was "mechanical". This is simply another baseless claim. Judge Bartels delivered long written statements justifying his sentences (Tr. 45-69, July 21, 1977).⁷⁸ Moreover, as our appeal from the sentence he imposed on Julianne Busic indicates, he treated each defendant separately. As usual, however, the description of what happened below is inaccurate.

⁷⁷ The extent to which these requests were made in good faith is further illustrated by Matanic's lawyer's suggestion that any 302 in which a witness quoted Matanic as saying he was on the plane unwillingly "I think without question would be Brady material" (Tr. 3346). Mr. Bergman must have known that Mr. Matanic would testify he never made such a statement. Indeed, he concedes as much in his brief (p. 63).

⁷⁸ Judge Bartels had also given a detailed statement, the day before, when he sentenced Zvonko and Julianne Busic (Tr. 45-62, July 20, 1977).

The brief of Pesut and Matanic says that after the sentence was imposed "each inquired of the court as to its reasons for giving, in practical effect, the same sentence it had imposed on Zvonko Basic" (Br. 66). In fact that was not the complaint at all; the complaint was that there was a "disparity" between the sentence imposed on Julie Basic, who was convicted on Count One, and Pesut and Matanic, who were acquitted (Tr. 65).⁷⁹ And Judge Bartels again explained his reasons (Tr. 70) for the "disparity". Since this is anything but a mechanical sentence, Pesut and Matanic have now changed the basis of the objection they voiced in the district court. Their present objection is, however, simply unsupported by the record.⁸⁰

⁷⁹ The disparity was relatively insignificant. Although Mrs. Basic received a life sentence, she was made eligible for parole after eight years. Pesut and Matanic, who received a maximum thirty-year sentence, will be eligible for parole after ten years.

⁸⁰ Moreover, Judge Bartels was simply needling the defendants' counsel, after they kept up a persistent and abrasive attack on him, when he suggested that they were lucky to have been acquitted (Tr. 74). And he told them: "Just don't strut around so indignantly" (Tr. 76). This conduct was typical of how the defendants often attempted to bait him into saying something that they could then cite on an appeal that was inevitable.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: November 16, 1977.

Respectfully submitted,

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AFFIDAVIT OF MAILING

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EASTERN DISTRICT OF NEW YORK

} ss

EDWARD R. KORMAN

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 23rd day of November 1977 he served a copy of the within
Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

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Edward R. Korman

Sworn to before me this

23rd day of November 1977.

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Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1979